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MEMORANDUM
(UPDATED 7/14/11)

This memorandum lists the instructions the Tennessee Pattern Jury Instruction Committee (Criminal) amended or created after the 14th edition of the book was published in 2010. The Administrative Office of the Courts' website includes Word and WordPerfect "without comments and footnotes" versions of the instructions at issue. The "with comments and footnotes" version of newly-created (or substantially revised) instructions 6.06, 7.08(d), 7.08(e), 10.17(b), 10.20, 10.21, 11.42, 21.01(c), 26.14, 31.06, and 38.01(b) are attached to this memorandum.

DEFINITION OF RECKLESSLY – Numerous instructions have errors in the definition of "recklessly." For the following instructions, substitute the correct definition: 5.01, 6.01, 6.03, 6.08, 6.08(a), 7.05(b), 7.08(a), 7.08(b), 7.08(c), 10.08, 10.19, 11.30, 12.01, 14.01, 14.02, 14.03, 14.06, 14.07(a), 18.02, 22.01, 22.02, 22.03, 22.04, 24.01, 24.03, 26.05, 26.06, 26.08, 26.09, 30.06, 30.11, 30.12(c), 30.16, 30.17, 30.18, 31.02, 31.03, 33.01, 33.02, 33.03, 33.05, 36.05, 36.05(a), 36.05(b), 36.06, 36.06(a), 36.06(b), 36.07, 36.08, 36.09, 36.11, 36.12, 36.13 (as noted below, 36.13 will be changed to number 36.06(c) in the new book),and 39.04. Here is the correct definition: "Recklessly" means that a person acts recklessly with respect to circumstances surrounding the conduct or the result of the conduct when the person is aware of, but consciously disregards, a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the accused person's standpoint.

3.01 – Criminal Responsibility for Conduct of Another

a. In paragraphs 2, 3, and 4, each of which is in brackets and begins with "The defendant(s)", add the following language, in bold, within the opening bracket and immediately prior to the existing language: **Use only if applicable: See Comment 1.**

b. Add "See Comment 1" after the period in footnote #4.

c. Create a Comment 1 and insert the following text:

> Our Supreme Court in *State v. Hatcher*, 310 S.W.3d 788, 810-14 (Tenn. 2010) has held that the trial judge should not charge the jury on all three types of criminal responsibility bracketed in this instruction, as to do so would be error.

> This Court long ago made clear that '[o]ne of the most important functions of the Trial Judge is to select the rules of law which apply to the evidence given in the case on trial.' *Adcock v. State*, 191 Tenn. 687, 236 S.W.2d 88, 89 (Tenn. 1949). And we have admonished that a trial court's jury charge 'should not contain inaccurate or inapplicable statements of legal principles that might tend to confuse the jury.' *Troup v. Fischer Steel Corp.*, 236 S.W.3d 143, 149 (Tenn. 2007) (*quoting Ingram v. Earthman*, 993 S.W.2d 611, 636 (Tenn. Ct. App. 1998)).

6.01 – Assault

a. At the beginning of the "fetus" provision on p. 60, add the following IN BOLD between the opening bracket and the word "Any": "**only for offenses committed prior to 7/1/11:**"

b. After the closing bracket of the existing "fetus" provision, add the following: [**only for offenses committed on or after 7/1/11:** Any alleged victim includes a fetus if at the time of the alleged criminal act a victim was pregnant.]

c. Following the period after "pregnant" in the new language, add a footnote with the following text: T.C.A. § 39-13-107, amended eff. 7/1/11, no longer requires that the fetus be viable to be considered a victim.

d. In existing footnote 7, delete "39-13-207" and substitute "39-13-107."

6.02 – Aggravated Assault

a. At the beginning of the "fetus" provision on p. 67, add the following IN BOLD between the opening bracket and the word "Any": "**only for offenses committed prior to 7/1/11:**"

b. After the closing bracket of the existing "fetus" provision, add the following: [**only for offenses committed on or after 7/1/11:** Any alleged victim includes a fetus if at the time of the alleged criminal act a victim was pregnant.]

c. Following the period after "pregnant" in the new language, add a footnote with the following text: T.C.A. § 39-13-107, amended eff. 7/1/11, no longer requires that the fetus be viable to be considered a victim.

d. In existing footnote 16, delete "39-13-207" and substitute "39-13-107."

e. Delete the text of Comment 3 and substitute the following: A violation of T.C.A. § 39-15-401, child abuse and neglect, may be a lesser included offense of aggravated assault. T.C.A. § 39-15-401(f).

6.03 – Reckless Endangerment

a. At the beginning of the "fetus" provision on p. 70, add the following IN BOLD between the opening bracket and the word "Any": "**only for offenses committed prior to 7/1/11:**"

b. After the closing bracket of the existing "fetus" provision, add the following: [**only for offenses committed on or after 7/1/11:** Any alleged victim includes a fetus if at the time of the alleged criminal act a victim was pregnant.]

c. Following the period after "pregnant" in the new language, add a footnote with the following text: T.C.A. § 39-13-107, amended eff. 7/1/11, no longer requires that the fetus be viable to be considered a victim.

d. In existing footnote 10, delete "39-13-207" and substitute "39-13-107."

e. Delete the text of Comment 2 and substitute the following: A violation of T.C.A. § 39-15-401, child abuse and neglect, may be a lesser included offense of reckless endangerment. T.C.A. § 39-15-401(f).

6.04 – Vehicular Assault

a. At the beginning of the "fetus" provision on p. 74, add the following IN BOLD between the opening bracket and the word "Any": "**only for offenses committed prior to 7/1/11:**"

b. After the closing bracket of the existing "fetus" provision, add the following: [**only for offenses committed on or after 7/1/11:** Any alleged victim includes a fetus if at the time of the alleged criminal act a victim was pregnant.]

c. Following the period after "pregnant" in the new language, add a footnote with the following text: T.C.A. § 39-13-107, amended eff. 7/1/11, no longer requires that the fetus be viable to be considered a victim.

d. In existing footnote 12, delete "39-13-207" and substitute "39-13-107."

e. Delete the text of Comment 2 and substitute the following: A violation of T.C.A. § 39-15-401, child abuse and neglect, may be a lesser included offense of vehicular assault. T.C.A. § 39-15-401(f).

6.06 – Criminal Exposure to [HIV] [HBV] [HCV]

a. New instruction – The committee made multiple changes to the existing 6.06, so this is essentially a new instruction.

6.08(a) – Domestic Assault (on or after 4/10/08)

a. At the beginning of the "fetus" provision on p. 85, add the following IN BOLD between the opening bracket and the word "Any": "**only for offenses committed prior to 7/1/11:**"

b. After the closing bracket of the existing "fetus" provision, add the following: [**only for offenses committed on or after 7/1/11:** Any alleged victim includes a fetus if at the time of the alleged criminal act a victim was pregnant.]

c. Following the period after "pregnant" in the new language, add a footnote with the following text: T.C.A. § 39-13-107, amended eff. 7/1/11, no longer requires that the fetus be viable to be considered a victim.

d. In existing footnote 7, delete "39-13-207" and substitute "39-13-107."

e. Add the following language to the end of Comment 1: For offenses committed on or after 7/1/10, the fee increases to $225, and as a condition of any sentence imposed, the sentencing judge may direct the defendant to complete available counseling programs that address violence and control issues, including, but not limited to, batterer's intervention programs certified by the domestic violence state coordinating council or any court-ordered drug or alcohol treatment program. The defendant's knowing failure to complete such an intervention program shall be considered a violation of the defendant's alternative sentencing program, and the sentencing judge may revoke the defendant's participation in such program and order execution of sentence. T.C.A. § 39-13-111(d).

7.01 – First Degree Murder (Premeditated Killing) (on or after 7/1/95)

a. At the beginning of the "fetus" provision on p. 91, add the following IN BOLD between the opening bracket and the word "Any": "**only for offenses committed prior to 7/1/11:**"

b. After the closing bracket of the existing "fetus" provision, add the following: [**only for offenses committed on or after 7/1/11:** Any alleged victim includes a fetus if at the time of the alleged criminal act a victim was pregnant.]

c. Following the period after "pregnant" in the new language, add a footnote with the following text: T.C.A. § 39-13-214, amended eff. 7/1/11, no longer requires that the fetus be viable to be considered a victim.

d. Delete the text of Comment 2 and substitute the following: A violation of T.C.A. § 39-15-401, child abuse and neglect, may be a lesser included offense of first degree murder. T.C.A. § 39-15-401(f).

e. Add the following as a new Comment 3: The trial judge should not add to the definition of premeditation in this instruction such language as "there are several factors which tend to support the existence of these elements which include: the use of a deadly weapon upon an unarmed victim; the particular cruelty of the killing; declarations by the defendant of an intent to kill; evidence of procurement of a weapon; preparations before the killing for concealment of the crime, and calmness immediately after the killing." This language, taken from *State v. Bland*, 958 S.W.2d 651, 660 (Tenn. 1997), has been held to be reversible error as a comment on the evidence. *See State v. Chuncy Lesolue Hollis*, No. W2009-02302-CCA-R3-CD (Tenn. Crim. App., filed Jan. 25, 2011, at Jackson).

f. Insert "**[See Comment 3]**" at the end of the "premeditation" paragraph at the top of page 91.

7.02 – First Degree Murder (Destructive Device, etc.) (on or after 7/1/95)

a. At the beginning of the "fetus" provision on p. 94, add the following IN BOLD between the opening bracket and the word "Any": "**only for offenses committed prior to 7/1/11:**"

b. After the closing bracket of the existing "fetus" provision, add the following: [**only for offenses committed on or after 7/1/11:** Any alleged victim includes a fetus if at the time of the alleged criminal act a victim was pregnant.]

c. Following the period after "pregnant" in the new language, add a footnote with the following text: T.C.A. § 39-13-214, amended eff. 7/1/11, no longer requires that the fetus be viable to be considered a victim.

d. Delete the text of Comment 2 and substitute the following: A violation of T.C.A. § 39-15-401, child abuse and neglect, may be a lesser included offense of first degree murder. T.C.A. § 39-15-401(f).

7.03 – First Degree Murder (Felony Murder) (on or after 7/1/95)

a. At the beginning of the "fetus" provision on p. 96, add the following IN BOLD between the opening bracket and the word "Any": "**only for offenses committed prior to 7/1/11:**"

b. After the closing bracket of the existing "fetus" provision, add the following: [**only for offenses committed on or after 7/1/11:** Any alleged victim includes a fetus if at the time of the alleged criminal act a victim was pregnant.]

c. Following the period after "pregnant" in the new language, add a footnote with the following text: T.C.A. § 39-13-214, amended eff. 7/1/11, no longer requires that the fetus be viable to be considered a victim.

d. Delete the text of Comment 2 and substitute the following: A violation of T.C.A. § 39-15-401, child abuse and neglect, may be a lesser included offense of first degree murder. T.C.A. § 39-15-401(f).

7.04(a) - First Degree Murder (punishment on or after 7/1/95)

a. Insert the following as a new option for aggravating circumstance #14 on page 104:

or

[The victim of the murder was seventy (70) years of age or older; or the victim of the murder was particularly vulnerable due to a significant disability, whether mental or physical, and at the time of the murder the defendant knew or reasonably should have known of such disability.] **[Only for offenses committed on or after July 1, 2011.]**

b. After this new paragraph, insert a footnote with the following text: Tenn. Pub. Acts 2011, ch. 47, effective July 1, 2011.

c. Insert the following new aggravating circumstance after aggravating circumstance #15 on page 104: [(16) The murder was committed against a pregnant woman, and the defendant intentionally killed the victim, knowing that she was pregnant. A person acts intentionally when it is the person's conscious objective or desire to cause the death of the alleged victim.] **[Only for offenses committed on or after July 1, 2010.]**

d. Following the word "knowing" in this new text, insert a footnote with the following text: The Committee is of the opinion that the usual definition of "knowingly" as set out in T.C.A. § 39-11-106(a)(20) should not be included in this aggravating circumstance as "the context requires otherwise." T.C.A. § 39-11-106(a). Although this aggravating circumstance requires that the defendant must be aware that the circumstance of pregnancy exists, the defendant must act intentionally, not knowingly.

e. Following the word "victim" immediately before the first closing bracket, insert a footnote with the following text: *State v. Page*, 81 S.W.3d 781, 790-93 (Tenn. Crim. App. 2002) (Appendix).

f. Following the closing bracket of this new text, insert a footnote with the following text: Tenn. Pub. Acts 2010, ch. 1058, effective July 1, 2010.

7.04(b) First Degree Murder (punishment on or after 7/1/95)

a. Insert the following as a new option for aggravating circumstance #14 on page 119:

or

[The victim of the murder was seventy (70) years of age or older; or the victim of the murder was particularly vulnerable due to a significant disability, whether mental or physical, and at the time of the murder the defendant knew or reasonably should have known of such disability.] **[Only for offenses committed on or after July 1, 2011.]**

b. After this new paragraph, insert a footnote with the following text: Tenn. Pub. Acts 2011, ch. 47, effective July 1, 2011.

c. Insert the following new aggravating circumstance after aggravating circumstance #15 on page 119: [(16) The murder was committed against a pregnant woman, and the defendant intentionally killed the victim, knowing that she was pregnant. A person acts intentionally when it is the person's conscious objective or desire to cause the death of the alleged victim.] **[Only for offenses committed on or after July 1, 2010.]**

d. Following the word "knowing" in this new text, insert a footnote with the following text: The Committee is of the opinion that the usual definition of "knowingly" as set out in T.C.A. § 39-11-106(a)(20) should not be included in this aggravating circumstance as "the context requires otherwise." T.C.A. § 39-11-106(a). Although this aggravating circumstance requires that the defendant must be aware that the circumstance of pregnancy exists, the defendant must act intentionally, not knowingly.

e. Following the word "victim" immediately before the first closing bracket, insert a footnote with the following text: *State v. Page*, 81 S.W.3d 781, 790-93 (Tenn. Crim. App. 2002) (Appendix).

f. Following the closing bracket of this new text, insert a footnote with the following text: Tenn. Pub. Acts 2010, ch. 1058, effective July 1, 2010.

7.05(a) – Second Degree Murder (knowing killing)

a. At the beginning of the "fetus" provision on p. 131, add the following IN BOLD between the opening bracket and the word "Any": "**only for offenses committed prior to 7/1/11:**"

b. After the closing bracket of the existing "fetus" provision, add the following: [**only for offenses committed on or after 7/1/11:** Any alleged victim includes a fetus if at the time of the alleged criminal act a victim was pregnant.]

c. Following the period after "pregnant" in the new language, add a footnote with the following text: T.C.A. § 39-13-214, amended eff. 7/1/11, no longer requires that the fetus be viable to be considered a victim.

d. Delete the text of Comment 2 and substitute the following: A violation of T.C.A. § 39-15-401, child abuse and neglect, may be a lesser included offense of second degree murder. T.C.A. § 39-15-401(f).

7.05(b) – Second Degree Murder (drugs as proximate cause)

a. At the beginning of the "fetus" provision on p. 134, add the following IN BOLD between the opening bracket and the word "Any": "**only for offenses committed prior to 7/1/11:**"

b. After the closing bracket of the existing "fetus" provision, add the following: [**only for offenses committed on or after 7/1/11:** Any alleged victim includes a fetus if at the time of the alleged criminal act a victim was pregnant.]

c. Following the period after "pregnant" in the new language, add a footnote with the following text: T.C.A. § 39-13-214, amended eff. 7/1/11, no longer requires that the fetus be viable to be considered a victim.

d. Delete the text of footnote #4 on page 133 and substitute the following: Taken from *Alessio v. Crook*, 633 S.W.2d 770, 776 (Tenn. Ct. App. 1982) *perm. app. denied* (Tenn. June 1, 1982); *Roberts v. Robertson County Bd. of Education*, 692 S.W.2d 863, 871 (Tenn. App. 1985), *perm. app. denied* (Tenn. June 17, 1985) (*citing Tennessee Trailways, Inc. v. Ervin*, 438 S.W.2d 733, 735 (1969)).

e. Delete the text of Comment 2 and substitute the following: A violation of T.C.A. § 39-15-401, child abuse and neglect, may be a lesser included offense of second degree murder. T.C.A. § 39-15-401(f).

7.06 – Voluntary Manslaughter

a. At the beginning of the "fetus" provision on p. 137, add the following IN BOLD between the opening bracket and the word "Any": "**only for offenses committed prior to 7/1/11:**"

b. After the closing bracket of the existing "fetus" provision, add the following: [**only for offenses committed on or after 7/1/11:** Any alleged victim includes a fetus if at the time of the alleged criminal act a victim was pregnant.]

c. Following the period after "pregnant" in the new language, add a footnote with the following text: T.C.A. § 39-13-214, amended eff. 7/1/11, no longer requires that the fetus be viable to be considered a victim.

d. Delete the text of Comment 2 and substitute the following: A violation of T.C.A. § 39-15-401, child abuse and neglect, may be a lesser included offense of voluntary manslaughter. T.C.A. § 39-15-401(f).

7.07 – Criminally Negligent Homicide

a. At the beginning of the "fetus" provision on p. 139, add the following IN BOLD between the opening bracket and the word "Any": "**only for offenses committed prior to 7/1/11:**"

b. After the closing bracket of the existing "fetus" provision, add the following: [**only for offenses committed on or after 7/1/11:** Any alleged victim includes a fetus if at the time of the alleged criminal act a victim was pregnant.]

c. Following the period after "pregnant" in the new language, add a footnote with the following text: T.C.A. § 39-13-214, amended eff. 7/1/11, no longer requires that the fetus be viable to be considered a victim.

d. Delete the text of Comment 2 and substitute the following: A violation of T.C.A. § 39-15-401, child abuse and neglect, may be a lesser included offense of criminally negligent homicide. T.C.A. § 39-15-401(f).

7.08(a) – Vehicular Homicide (reckless conduct)

a. At the beginning of the "fetus" provision on p. 142, add the following IN BOLD between the opening bracket and the word "Any": "**only for offenses committed prior to 7/1/11:**"

b. After the closing bracket of the existing "fetus" provision, add the following: [**only for offenses committed on or after 7/1/11:** Any alleged victim includes a fetus if at the time of the alleged criminal act a victim was pregnant.]

c. Following the period after "pregnant" in the new language, add a footnote with the following text: T.C.A. § 39-13-214, amended eff. 7/1/11, no longer requires that the fetus be viable to be considered a victim.

d. Following the definition of "proximate result" on page 141, insert a footnote with the following text: The definition of "proximate result" is based on the definition of "proximate cause," as set forth in T.P.I. – CRIM. 7.05(b), Second degree murder (drugs as proximate cause).

e. Delete the text of Comment 2 and substitute the following: A violation of T.C.A. § 39-15-401, child abuse and neglect, may be a lesser included offense of vehicular homicide. T.C.A. § 39-15-401(f).

7.08(b) – Vehicular Homicide (intoxication)

a. In element 1, delete "motor vehicle" and substitute the following in italics: *[motor vehicle] [automobile] [airplane] [motorboat]*

b. At the beginning of the "fetus" provision on p. 146, add the following IN BOLD between the opening bracket and the word "Any": "**only for offenses committed prior to 7/1/11:**"

c. After the closing bracket of the existing "fetus" provision, add the following: [**only for offenses committed on or after 7/1/11:** Any alleged victim includes a fetus if at the time of the alleged criminal act a victim was pregnant.]

d. Following the period after "pregnant" in the new language, add a footnote with the following text: T.C.A. § 39-13-214, amended eff. 7/1/11, no longer requires that the fetus be viable to be considered a victim.

e. Following the definition of "proximate result" on page 145, insert a footnote with the following text: The definition of "proximate result" is based on the definition of "proximate cause," as set forth in T.P.I. – CRIM. 7.05(b), Second degree murder (drugs as proximate cause).

f. Delete the text of Comment 2 and substitute the following: A violation of T.C.A. § 39-15-401, child abuse and neglect, may be a lesser included offense of vehicular homicide. T.C.A. § 39-15-401(f).

g. Delete the paragraphs beginning with "Intoxication" and "The expression" on page 145 and substitute the following (the opening and closing brackets are all in BOLD):

[Only for offenses committed on or after 1/1/11: "Intoxication" is defined as acting under the influence of *[an intoxicant] [marijuana] [a controlled substance] [a drug] [a substance affecting the central nervous system] [or any combination thereof].*

The expression "under the influence of *[an intoxicant] [marijuana] [a controlled substance] [a drug] [a substance affecting the central nervous system] [or any combination thereof]*" covers not only all the well known and easily recognized conditions and degrees of intoxication, but also any mental or physical condition which is the result of taking *[an intoxicant] [marijuana] [a controlled substance] [a drug] [a substance affecting the central nervous system] [or any combination thereof]* in any form and which deprives one of that clearness of mind and control of oneself which one would otherwise possess. In this situation, it would not be necessary that the person be in such a condition as would make *[him] [her]* guilty of public drunkenness. The law merely requires that the person be under the influence of *[an intoxicant] [marijuana] [a controlled substance] [a drug] [a substance affecting the central nervous system] [or any combination thereof].* The degree of intoxication must be such that it impairs the driver's ability to safely operate a motor vehicle by depriving the driver of the clearness of mind and control of *[himself] [herself]* which *[he] [she]* would otherwise possess.**]**

[Only for offenses committed prior to 1/1/11: "Intoxication" is defined as acting under the influence of *[an intoxicant] [marijuana] [a narcotic drug] [a drug producing stimulating effects on the central nervous system].*

The expression "under the influence of *[an intoxicant] [marijuana] [a narcotic drug] [a drug producing stimulating effects on the central nervous system]*" covers not only all the well known and easily recognized conditions and degrees of intoxication, but also any mental or physical condition which is the result of taking *[an intoxicant] [marijuana] [a narcotic drug] [a drug producing stimulating effects on the central nervous system]* in any form and which deprives one of that clearness of mind and control of oneself which one would otherwise possess. In this situation, it would not be necessary that the person

be in such a condition as would make *[him] [her]* guilty of public drunkenness. The law merely requires that the person be under the influence of *[an intoxicant] [marijuana] [a narcotic drug] [a drug producing stimulating effects on the central nervous system].* The degree of intoxication must be such that it impairs to any extent the driver's ability to operate a vehicle.**]**

7.08(c) – Vehicular Homicide (.08% of alcohol concentration)

a. In element 1, delete "motor vehicle" and substitute the following in italics: *[motor vehicle] [automobile] [airplane] [motorboat]*

b. At the beginning of the "fetus" provision on p. 148, add the following IN BOLD between the opening bracket and the word "Any": "**only for offenses committed prior to 7/1/11:**"

c. After the closing bracket of the existing "fetus" provision, add the following: [**only for offenses committed on or after 7/1/11:** Any alleged victim includes a fetus if at the time of the alleged criminal act a victim was pregnant.]

d. Following the period after "pregnant" in the new language, add a footnote with the following text: T.C.A. § 39-13-214, amended eff. 7/1/11, no longer requires that the fetus be viable to be considered a victim.

e. Following the definition of "proximate result" on page 148, insert a footnote with the following text: The definition of "proximate result" is based on the definition of "proximate cause," as set forth in T.P.I. – CRIM. 7.05(b), Second degree murder (drugs as proximate cause).

f. Delete the text of Comment 2 and substitute the following: A violation of T.C.A. § 39-15-401, child abuse and neglect, may be a lesser included offense of vehicular homicide. T.C.A. § 39-15-401(f).

7.08(d) – Vehicular Homicide (Drag Racing)

a. New instruction

7.08(e) – Vehicular Homicide (Construction Zone)

a. New instruction

7.09 – Reckless Homicide

a. At the beginning of the "fetus" provision on p. 150, add the following IN BOLD between the opening bracket and the word "Any": "**only for offenses committed prior to 7/1/11:**"

b. After the closing bracket of the existing "fetus" provision, add the following: [**only for offenses committed on or after 7/1/11:** Any alleged victim includes a fetus if at the time of the alleged criminal act a victim was pregnant.]

c. Following the period after "pregnant" in the new language, add a footnote with the following text: T.C.A. § 39-13-214, amended eff. 7/1/11, no longer requires that the fetus be viable to be considered a victim.

d. Delete the text of Comment 2 and substitute the following: A violation of T.C.A. § 39-15-401, child abuse and neglect, may be a lesser included offense of reckless homicide. T.C.A. § 39-15-401(f).

7.11 – Aggravated Vehicular Homicide

a. Delete the last paragraph, which deals with a fetus as a victim.

9.01 – Robbery

a. In footnote 3, add the following text immediately prior to "State v. Owens": State v. Swift, 308 S.W.3d 827, 831 (Tenn. 2010);

9.02 – Aggravated Robbery

a. In footnote 3, add the following text immediately prior to "State v. Owens": State v. Swift, 308 S.W.3d 827, 831 (Tenn. 2010);

b. Add a new comment, which will have the following text (please bold the text where it is bolded in this summary): There shall be no release eligibility for a person committing this offense **on or after July 1, 2010**, until the person has served eighty-five percent (85%) of the sentence imposed by the court less sentence credits earned and retained. However, no sentence reduction credits authorized by § 41-21-236, or any other provision of law, shall operate to reduce below seventy percent (70%) the percentage of sentence imposed by the court such person must serve before becoming release eligible. T.C.A. § 40-35-501(k)(1).

9.03 – Especially Aggravated Robbery

a. In footnote 3, add the following text immediately prior to "State v. Owens": State v. Swift, 308 S.W.3d 827, 831 (Tenn. 2010);

10.01 – Aggravated Rape

a. At the end of Comment 1, add the following sentence: The offender shall also be sentenced to community supervision for life.

b. Delete the text of Comment 3 and substitute the following: A violation of T.C.A. § 39-15-401, child abuse and neglect, may be a lesser included offense of aggravated rape. T.C.A. § 39-15-401(f).

10.02 – Rape

a. At the end of Comment 1, add the following sentence: The offender shall also be sentenced to community supervision for life.

b. Delete the text of Comment 3 and substitute the following: A violation of T.C.A. § 39-15-401, child abuse and neglect, may be a lesser included offense of rape. T.C.A. § 39-15-401(f).

10.03 – Aggravated Sexual Battery

a. At the end of Comment 1, add the following sentence: The offender shall also be sentenced to community supervision for life.

b. Delete the text of Comment 2 and substitute the following: A violation of T.C.A. § 39-15-401, child abuse and neglect, may be a lesser included offense of aggravated sexual battery. T.C.A. § 39-15-401(f).

10.04 – Sexual Battery

a. Delete the text of Comment 2 and substitute the following: A violation of T.C.A. § 39-15-401, child abuse and neglect, may be a lesser included offense of sexual battery. T.C.A. § 39-15-401(f).

10.04(a) – Sexual Battery By Authority Figure (prior to 7/1/06)

a. Delete the text of Comment 3 and substitute the following: A violation of T.C.A. § 39-15-401, child abuse and neglect, may be a lesser included offense of sexual battery by an authority figure. T.C.A. § 39-15-401(f).

10.04(b) – Sexual Battery by Authority Figure (on or after 7/1/06)

a. Delete the text of Comment 3 and substitute the following: A violation of T.C.A. § 39-15-401, child abuse and neglect, may be a lesser included offense of sexual battery by an authority figure. T.C.A. § 39-15-401(f).

10.05 – Statutory Rape (prior to 7/1/06)

a. Delete the text of Comment 3 and substitute the following: A violation of T.C.A. § 39-15-401, child abuse and neglect, may be a lesser included offense of statutory rape. T.C.A. § 39-15-401(f).

10.05(a) – Mitigated Statutory Rape (on or after 7/1/06)

a. Delete the text of Comment 2 and substitute the following: A violation of T.C.A. § 39-15-401, child abuse and neglect, may be a lesser included offense of mitigated statutory rape. T.C.A. § 39-15-401(f).

10.05(b) – Statutory Rape (on or after 7/1/06)

a. Delete the text of Comment 2 and substitute the following: A violation of T.C.A. § 39-15-401, child abuse and neglect, may be a lesser included offense of statutory rape. T.C.A. § 39-15-401(f).

10.05(c) – Aggravated Statutory Rape (on or after 7/1/06)

a. Delete the text of Comment 2 and substitute the following: A violation of T.C.A. § 39-15-401, child abuse and neglect, may be a lesser included offense of aggravated statutory rape. T.C.A. § 39-15-401(f).

10.12 – [Aggravated] Rape of a Child [Aggravated Rape of a Child Effective for Offenses Committed on or after July 1, 2006]

a. Delete Comment 1 and substitute the following: Rape of a child is a Class A felony, and the offender shall also be sentenced to community supervision for life. T.C.A. § 39-13-522(b). For offenses committed on or after July 1, 2007, but prior to January 1, 2012, rape of a child is a Class A felony, punishable by a minimum sentence of 25 years, and the offender shall never be allowed to petition for release from supervision for life. T.C.A. § 39-13-522(b). For offenses committed on or after January 1, 2012, rape of a child is a Class A felony and the defendant shall be punished as a Range II offender; however, "the sentence imposed upon such person may, if appropriate, be within Range III but in no case shall it be lower than Range II." T.C.A. § 39-13-522(b)(2)(A). Aggravated rape of a child is a Class A felony and shall be sentenced within Range III. T.C.A. § 39-13-531(b). An offender who commits aggravated rape of a child on or after July 1, 2010, also shall be sentenced to community supervision for life.

b. Delete the text of Comment 3 and substitute the following: A violation of T.C.A. § 39-15-401, child abuse and neglect, may be a lesser included offense of rape of a child or aggravated rape of a child. T.C.A. § 39-15-401(f).

10.16(a) – Violation of Sex Offender Registration Act (on or after 8/1/05)

a. In element (2) of Part L at the top of page 299, insert the following between "agency" and "to update": [**for offenses committed on or after 7/1/10:** , on a date established by such agency,]

b. Delete the text of footnote 1 on page 293 and substitute the following: T.C.A. §§ 40-39-203, -204, and -208(a)(1-9).

c. Add closing brackets for Parts N, O, Q, R, S and T

d. In the first line of Part N, add a bolded colon after 7/1/07. In the first line of Part O, add a bolded colon after 7/1/07. In the first line of Part P, add a bolded colon after 8/1/07.

e. Add the following new language after the text of Part T on page 303:

or

[Part U: **only for offenses committed on or after 5/20/11:**

(1) that the defendant had a conviction for [_____] *[insert in this blank space a criminal offense or offenses listed in Tenn. Code Ann. § 40-39-202 under the definition of "Sexual Offense" or "Violent Sexual Offense." See Comment 2.]*;

and

(2) that the defendant was housed in a halfway house or any other facility as an alternative to incarceration where unsupervised contact is permitted outside of the facility;

and

(3) that the defendant failed to register or report with the registering agency in the city or county of the facility in which the offender was housed.]

or

[Part V: **only for offenses committed on or after 7/1/11:**

(1) that the defendant had a conviction for [_____] *[insert in this blank space a criminal offense or offenses listed in Tenn. Code Ann. § 40-39-202 under the definition of "Sexual Offense" or "Violent Sexual Offense." See Comment 2.]*;

and

(2) that the defendant failed to report to the designated law enforcement agency at least twenty-one (21) days before traveling out of the country. [It is a defense to this offense that the defendant traveled out of the country frequently for work or other legitimate purpose with the written approval of the designated law enforcement agency, or that the defendant traveled out of the country for an emergency situation and reported to the designated law enforcement agency at least twenty-four (24) hours before traveling out of the country].]

or

[Part W: **only for offenses committed on or after 5/23/11:**

(1) that the defendant had a conviction for [_____] *[insert in this blank space a criminal offense or offenses listed in Tenn. Code Ann. § 40-39-202 under the definition of "Sexual Offense" or "Violent Sexual Offense." See Comment 2.]*;

and

(2) that the defendant was incarcerated in this state prior to August 1, 2011, in a local, state or federal jail or a private penal institution and had not registered pursuant to § 40-39-212(a) or any other provision of law;

and

(3) that the defendant failed to report in person, register, complete and sign a TBI registration form under penalty of perjury by August 1, 2011, with the warden or the warden's designee if incarcerated in a state, federal or private penal facility, or with the sheriff or the sheriff's designee if incarcerated in a local jail.]

10.17 – Violation of Sex Offender Residential or Work Restrictions (on or after 8/1/04, but prior to 8/1/05)

a. Delete this instruction

10.17(a) – Violation of Sex Offender Residential or Work Restrictions (on or after 8/1/05)

a. Add the following to the title of this instruction after "8/1/05": , but prior to 8/17/09

b. Add a footnote with the following text to the title of this instruction: For instructions for this offense occurring from 8/1/04 to 7/31/05, see T.P.I. Crim. – 10.17 in the 14th edition. There is no pattern charge for offenses occurring before that date.

c. Delete "1000" everywhere it appears and substitute "1,000"

10.17(b) – Violation of Sex Offender Residential or Work Restrictions (on or after 8/17/09)

a. New instruction

10.20 – Violation of Community Supervision

a. New instruction

10.21 – Sexual Contact by an Authority Figure

a. New instruction

11.02 – Theft of Services

a. Delete the definition of "services" and substitute the following: "Services" includes *[labor] [skill] [professional service] [transportation] [telephone] [mail] [gas] [electricity] [steam] [water] [cable TV]* **[only for offenses committed on or after 7/1/11:** *entertainment subscription service]* *[other public services] [accommodations in hotels, restaurants or elsewhere] [admissions to exhibitions] [use of vehicles or other movable property]* **[only for offenses committed on or after 7/1/09:** *any activity or product considered in the ordinary course of business to be a service]*.

b. In element 2 of Part A on p.334, insert the following between "coercion" and "false pretense": **[only for offenses committed on or after 7/1/11:** forgery, false statement,**]**

11.09 – Worthless Checks

a. Delete the definition of "services" and substitute the following: "Services" includes *[labor] [skill] [professional service] [transportation] [telephone] [mail] [gas] [electricity] [steam] [water] [cable TV]* **[only for offenses committed on or after 7/1/11:** *entertainment subscription service]* *[other public services] [accommodations in hotels, restaurants or elsewhere] [admissions to exhibitions] [use of vehicles or other movable property]* **[only for offenses committed on or after 7/1/09:** *any activity or product considered in the ordinary course of business to be a service]*.

11.35(a) – Identity Theft (on or after 7/1/04)

a. Add the following language as a new Comment 4: For offenses committed on or after 7/1/11, venue for this offense shall be in any county where an essential element of the offense was committed, including but not limited to, in any county where the victim resides or is found, regardless of whether the defendant was ever actually in such county. T.C.A. § 39-14-150(j)(4).

11.42 – TennCare Fraud

a. New instruction

14.06 – Aggravated Criminal Trespass

a. Change element 3 to 3(a), and add the following:

or

(3)(b) **only for offenses committed on or after 7/1/11:** that the defendant, in order to gain entry to the property, *[destroyed] [cut] [vandalized] [altered] [removed] [a gate] [signage] [fencing] [a lock] [a chain] [a barrier]* designed to keep trespassers from entering the property.

b. Following "[vandalized]" add a footnote with the following text: The trial judge may wish to utilize T.P.I. – Crim. 14.04.

21.01(a) – Aggravated Child Abuse and Neglect (prior to 7/1/05)

a. Insert the following in brackets between the definition of "injury" and "serious bodily injury": [To constitute "neglect," the state must prove beyond a reasonable doubt that there was an actual adverse effect to the child's health and welfare. A mere risk of harm is not sufficient. FN10 Neglect is a continuing course of conduct beginning with the first act or omission that causes adverse effects to a child's health and welfare, and can be an act of commission or omission. FN11]

b. New Footnote 10's text will be as follows: *State v. Mateyko*, 53 S.W.3d 666, 668-72 (Tenn. 2001).

c. New Footnote 11's text will be as follows: *State v. Adams*, 24 S.W.3d 289, 294-97 (Tenn. 2000).

d. Renumber the existing footnotes accordingly.

21.01(b) – Aggravated Child [Abuse] [Neglect or Endangerment] (for offenses committed on or after July 1, 2005)

a. In the title of this instruction, insert the following immediately after 2005: ", but prior to July 1, 2009"

b. In footnote 16, delete "Preponderance of the Evidence" and substitute "Preponderance of Evidence".

c. Add the following definition in brackets after the definition for "Child": ["Controlled substance" means a drug, substance, or immediate precursor in Schedules I through VI of §§ 39-17-403 — 39-17-415. [_____] is a *[drug] [substance] [immediate precursor]* in Schedules I through VI of §§ 39-17-403 — 39-17-415.]

d. Add a footnote with the following text after the definition for "controlled substance": T.C.A. § 39-17-402(4).

e. Insert the following in brackets between the definition of "injury" and "serious bodily injury": [To constitute "neglect," the state must prove beyond a reasonable doubt that there was an actual adverse effect to the child's health and welfare. A mere risk of harm is not sufficient. FN Neglect is a continuing course of conduct beginning with the first act or omission that causes adverse effects to a child's health and welfare, and can be an act of commission or omission. FN]

f. The text of the first new footnote in this paragraph will be as follows: *State v. Mateyko*, 53 S.W.3d 666, 668-72 (Tenn. 2001).

g. The text of the second new footnote in this paragraph will be as follows: *State v. Adams*, 24 S.W.3d 289, 294-97 (Tenn. 2000).

h. Renumber the existing footnotes accordingly.

21.01(c) – Aggravated Child [Abuse] [Neglect] (for offenses committed on or after 7/1/09)

a. New instruction

21.02(a) – Child Abuse and Neglect (prior to 7/1/05)

a. Insert the following in brackets after the definition of "injury": [To constitute "neglect," the state must prove beyond a reasonable doubt that there was an actual adverse effect to the child's health and welfare. A mere risk of harm is not sufficient. FN6 Neglect is a continuing course of conduct beginning with the first act or omission that causes adverse effects to a child's health and welfare, and can be an act of commission or omission. FN7]

b. New Footnote 6's text will be as follows: *State v. Mateyko*, 53 S.W.3d 666, 668-72 (Tenn. 2001).

c. New Footnote 7's text will be as follows: *State v. Adams*, 24 S.W.3d 289, 294-97 (Tenn. 2000).

d. Renumber the existing footnotes accordingly.

e. In Comment 3, delete 39-15-401(d) and substitute 39-15-401(f).

21.02(b) – Child [Abuse] [Neglect] (on or after 7/1/05)

a. Insert the following in brackets after the definition of "injury": [To constitute "neglect," the state must prove beyond a reasonable doubt that there was an actual adverse effect to the child's health and welfare. A mere risk of harm is not sufficient. FN9 Neglect is a continuing course of conduct beginning with the first act or omission that causes adverse effects to a child's health and welfare, and can be an act of commission or omission. FN10]

b. New Footnote 9's text will be as follows: *State v. Mateyko*, 53 S.W.3d 666, 668-72 (Tenn. 2001).

c. New Footnote 10's text will be as follows: *State v. Adams*, 24 S.W.3d 289, 294-97 (Tenn. 2000).

d. Renumber the existing footnotes accordingly.

e. Add the following language to Comment One on page 597: For offenses committed on or after 7/1/11, the court may, in addition to any other punishment otherwise authorized by law, order a person convicted of child abuse to refrain from having any contact with the victim of the offense, including but not limited to, attempted contact through Internet services or social networking web sites; provided that the person has no parental rights to such victim at the time of the court's order. T.C.A. § 39-15-401(h).

f. In Comment 2, delete 39-15-401(d) and substitute 39-15-401(f).

21.03(a) – Parental or Custodial Child Endangerment

a. In elements 2 and 3, delete "[abuse] [neglect]" and substitute "abuse or neglect".

b. Reverse the order of the definitions for "physical injury" and "parent or custodian" so "parent or custodian" appears first. Also, change the "I" in "physical injury" from capital to lowercase.

c. Immediately prior to the definition of "parent or custodian" add the following new definition: "Child" means a person under eighteen (18) years of age. ALSO, add the following footnote after that definition: T.C.A. § 39-15-401(a) and (b).

d. In the definition of "Parent or custodian", delete "Parent or custodian" and substitute the following: For the purpose of parental or custodial child endangerment, "parent or custodian"

e. In the definition of "Knowingly", delete "Knowingly" and substitute the following: For the purpose of parental or custodial child endangerment, "knowingly"

21.03(b) – Aggravated Parental or Custodial Child Endangerment

a. In elements 2, 3, 4(a) and 4(c), delete "[abuse] [neglect]" and substitute "abuse or neglect".

b. Reverse the order of the definitions of "dangerous instrumentality" and "controlled substance" so that the definition of "controlled substance" appears first.

c. Add the following definition immediately prior to the definition of "controlled substance": "Child" means a person under eighteen (18) years of age. ALSO, add the following footnote after that definition: T.C.A. § 39-15-401(a) and (b).

d. In the definition of "Parent or custodian", delete "Parent or custodian" and substitute the following: For the purpose of aggravated parental or custodial child endangerment, "parent or custodian"

e. Immediately after the definition for "parent or custodian" add the following definition: "Physical injury" includes a cut, abrasion, bruise, burn or disfigurement, and physical pain or temporary illness or impairment of the function of a bodily member, organ, or mental faculty. ALSO, add the following footnote after that definition: T.C.A. § 39-11-106(a)(2). This is the definition of "bodily injury."

f. In the definition of "Knowingly", delete "Knowingly" and substitute the following: For the purpose of aggravated parental or custodial child endangerment, "knowingly"

24.01 – Criminal Impersonation

a. In Part A, delete element (1)(d) at the bottom of page 641 and substitute the following: (d) that the defendant pretended to have a **[only for offenses committed prior to 7/1/11:** handicap or**]** disability;

26.03 – Tampering With or Fabricating Evidence

a. Add the following definition in brackets after the definition of "Official proceeding": ["Thing" means an object or entity not precisely designated or capable of being designated.] Following this definition, insert a footnote with the following text: *State v. Majors*, 318 S.W.3d 850 (Tenn. 2010).

b. Move the mens rea definitions (knowingly, transition paragraph, intentionally) to the end of the instruction.

c. Delete elements (2)(a) and (2)(b) and substitute the following:

(2) (a) that the defendant *[altered] [destroyed] [concealed]* a *[record] [document] [thing]* with the intent to impair its *[verity] [legibility] [availability as evidence]* in the *[investigation] [official proceeding]*;

or

(b) that the defendant *[made] [presented] [used]* a *[record] [document] [thing]* with knowledge of its falsity with the intent to affect the *[course] [outcome]* of the *[investigation] [official proceeding]*.

26.14 – Illegal [Registration] [Voting]

a. New instruction

28.01 – Perjury

a. Following the last element of Part C, add an "or" (included below) and the following language as a new Part D

or

[Part D:

(1) that the defendant made a false statement, not under oath, but in a declaration stating on its face that it was made under penalty of perjury;

and

(2) that the statement was made with the intent to deceive.(FN)]

b. Following the word "deceive" add a footnote with the following text: *See* definition of "deception" in T.C.A. § 39-11-106(a)(6).

30.07 – Harassment

a. Delete element 1 of Part D on page 788 and substitute the following text: that the defendant communicated with another person **[only for offenses committed on or after 7/1/11:** or transmitted or displayed an image in a manner in which there is a reasonable expectation that the image would be viewed by the alleged victim**]** *[by telephone] [in writing] [by electronic communication, including but not limited to, text messaging, facsimile transmissions, electronic mail or internet services]* without legitimate purpose;

b. Immediately prior to the definition of "malicious", add the following new definition in brackets: ["Image" includes, but is not limited to, a visual depiction, video clip or photograph of another person.]

c. Following the closing bracket of this new definition, add a footnote with the following text: T.C.A. § 39-17-308(d).

30.11 – Obstructing Highway or Passageway

a. In element 1 of Part A, add a second opening bracket prior to "[a highway]" so it appears as follows: [[a highway].

b. In that same element, italicize "to which the public, or a substantial portion of the public, had access]"

31.01 – Controlled Substances: Manufacture, Delivery or Sale

a. Add the following to the element section of the existing instruction:

[and

(3)(a) that this occurred *[on the grounds or facilities of a school] [within one thousand feet (1,000') of the real property that comprises a [public] [private] [elementary school] [middle school] [secondary school] [preschool] [child care agency] [public library] [recreational center] [park]]*.(FN)

or (FN)

(b) that the recipient or intended recipient of the (insert controlled substance) was under eighteen (18) years of age.](FN)

b. The new footnote after the period following "park" should read as follows: T.C.A. § 39-17-432.

c. The new footnote after "or" should read as follows: Pursuant to T.C.A. § 39-17-432(g), the sentence of a defendant who, as the result of a single act, violates both elements 3(a) and 3(b) may only be enhanced one (1) time under those sections for each act. The state must elect under which section it intends to seek enhancement of the defendant's sentence and must provide notice of the election pursuant to §40-35-202 (written notice at least 10 days prior to trial).

d. The new footnote after the closing bracket following "age" should read as follows: T.C.A. § 39-17-417(k).

e. Add the following at the end of existing Comment One: If the jury finds the intended recipient of the controlled substance was a minor, the defendant shall be punished one (1) classification higher than provided in subsections (b)-(i). If the offense occurred on the grounds or facilities of any school or within one thousand feet (1,000') of the real property that comprises a public or private elementary school, middle school, or secondary school, the defendant shall be punished one (1) classification higher than is provided in § 39-17-417(b)-(i) for such violation, the maximum fines to be imposed are increased, and the minimum sentence in the defendant's range must be served at 100%. *See* T.C.A. § 39-17-432 and *Davis v. State*, 313 S.W.3d 751, 760-66 (Tenn. 2010). If the offense occurred on the grounds or facilities of a preschool, childcare center, public library, recreational center or park, the defendant shall be punished one (1) classification higher for purposes of the fines set out in T.C.A. § 39-17-432(b)(2), and the minimum sentence in the defendant's range must be served at 100%, but the defendant shall not be punished one (1) classification higher for purposes of incarceration.

31.04 – Controlled Substances: Possession with Intent to Sell or Deliver

a. Add the following to the element section of the existing instruction:

[and

(3)(a) that this occurred *[on the grounds or facilities of a school] [within one thousand feet (1,000') of the real property that comprises a [public] [private] [elementary school] [middle school] [secondary school] [preschool] [child care agency] [public library] [recreational center] [park]]*.(FN)

or (FN)

(b) that the recipient or intended recipient of the (insert controlled substance) was under eighteen (18) years of age.](FN)

b. The new footnote after the period following "park" should read as follows: T.C.A. § 39-17-432.

c. The new footnote after "or" should read as follows: Pursuant to T.C.A. § 39-17-432(g), the sentence of a defendant who, as the result of a single act, violates both elements 3(a) and 3(b) may only be enhanced one (1) time under those sections for each act. The state must elect under which section it intends to seek enhancement of the defendant's sentence and must provide notice of the election pursuant to §40-35-202 (written notice at least 10 days prior to trial).

d. The new footnote after the closing bracket following "age" should read as follows: T.C.A. § 39-17-417(k).

e. Add the following at the end of existing Comment One: If the jury finds the intended recipient of the controlled substance was a minor, the defendant shall be punished one (1) classification higher than provided in subsections (b)-(i). If the offense occurred on the grounds or facilities of any school or within one thousand feet (1,000') of the real property that comprises a public or private elementary school, middle school, or secondary school, the defendant shall be punished one (1) classification higher than is provided in § 39-17-417(b)-(i) for such violation, the maximum fines to be imposed are increased, and the minimum sentence in the defendant's range must be served at 100%. *See* T.C.A. § 39-17-432 and *Davis v. State*, 313 S.W.3d 751, 760-66 (Tenn. 2010). If the offense occurred on the grounds or facilities of a preschool, childcare center, public library, recreational center or park, the defendant shall be punished one (1) classification higher for purposes of the fines set out in T.C.A. § 39-17-432(b)(2), and the minimum sentence in the defendant's range must be served at 100%, but the defendant shall not be punished one (1) classification higher for purposes of incarceration.

31.06 – Currently "Reserved" but will now be "Unlawful [Distribution] [Dispensing] of a Controlled Substance"

a. New instruction

31.11 – Obtaining Controlled Substance by Fraud

a. Insert the following IN BRACKETS between element 3 and the definition of "Misrepresentation": [The trial judge may wish to utilize T.P.I. – Crim. 4.01, Criminal Attempt.]

31.14(a) – Promoting Methamphetamine Manufacture

a. In the paragraph below Part C's elements on page 878, delete the first two lines and substitute the following: [If you find from the proof that the defendant possessed more than 15 grams **[for offenses committed prior to 7/1/11:** 20 grams**]** of an immediate methamphetamine

b. Add the following to the end of Comment One: T.C.A. § 39-17-433(f).

c. Add the following as a new Comment Two: For offenses committed on or after July 1, 2011, if the chemical, drug, ingredient, or apparatus to produce methamphetamine was purchased in more than one county, venue for purposes of prosecution is proper in any county in which such an item was purchased. If immediate methamphetamine precursors were purchased in more than one county, venue for purposes of prosecution is proper in any county in which a precursor was purchased. T.C.A. § 39-17-433(e).

36.06 – Unlawful Possession of Deadly Weapon with Intent to Employ it in Commission of or Escape from Offenses (offenses committed prior to 1/1/08)

a. Add the following as a new definition prior to the definition for "firearm": "Employ" means to make use of. Following this definition, insert a footnote with this text: Black's Law Dictionary, 7th Edition.

36.06(a) – Unlawful Possession of Deadly Weapon with Intent to Employ it During the [Commission of] [Attempt to Commit] [Escape from] an offense (for "non-dangerous offenses" on or after 1/1/08)

a. Add the following as a new definition prior to the definition for "firearm": "Employ" means to make use of. Following this definition, insert a footnote with this text: Black's Law Dictionary, 7th Edition.

b. In Comment 1, delete "36.13" and substitute "36.06(c)".

36.06(b) – Unlawful Possession of Deadly Weapon other than a Firearm with Intent to Employ it During the [Commission of] [Attempt to Commit] [Escape from] a Dangerous Offense (for offenses committed on or after 1/1/08)

a. Add the following as a new definition after the definition for "deadly weapon": "Employ" means to make use of. Following this definition, insert a footnote with this text: Black's Law Dictionary, 7th Edition.

b. In Comment 1, delete "36.13" and substitute "36.06(c)".

36.06(c) and 36.06(d)

a. 36.06(c) and 36.06(d) are numbered as 36.13 and 36.14, respectively, in the 14th Edition of the book. They will be numbered as 36.06(c) and 36.06(d) in the 15th edition of the book.

36.08 – Carrying Weapon with Intent to go Armed

a. Delete Comment 2 and Comment 3, and substitute the following as the text of Comment 2: The trial court should refer to T.C.A. §§ 39-17-1307(e), 39-17-1308, and 39-17-1315 for defenses (39-11-202) and exceptions (39-11-203) to this offense.

b. Renumber Comment 4 as Comment 3.

36.13 – Unlawful [Possession] [Employment] of a Firearm [with Intent to go Armed] During the [Commission of or Attempt to Commit] [Flight or Escape from the Commission of or Attempt to Commit] a Dangerous Offense

a. Move the definition of "firearm" so it appears prior to the definition of "possession".

b. Add the following as a new definition IN BRACKETS prior to the definition for "firearm": "Employ" means to make use of. Following this definition, insert a footnote with this text: Black's Law Dictionary, 7th Edition.

c. Renumber this instruction as 36.06(c).

36.14 – Supplemental Instruction Number One

a. Renumber this instruction as 36.06(d).

38.01 – DUI, etc. (WILL NOW BE 38.01(a))

a. In Comment 2, delete "T.P.I. – Crim. 38.07 (DUI by Consent);"

b. In Comment 2, delete the "and" which appears before "T.P.I. – Crim. 38.08 (Supplemental Instruction for Multiple Counts of Prior Convictions)."

c. In the title of this instruction, delete 38.01 and substitute 38.01(a).

d. Add the following to the end of the title of this instruction: (for offenses committed prior to 1/1/11)

e. In element 4(b) on page 1066, delete "suffers" and substitute "suffered."

f. In element 4(c) on page 1066, delete "is" and substitute "was."

g. Delete the paragraph which appears immediately after the elements of the offense on p. 1066 and begins with "The expression under the influence . . . " and substitute the following two paragraphs:

"Intoxication" is defined as acting under the influence of *[an intoxicant] [marijuana] [a narcotic drug] [a drug producing stimulating effects on the central nervous system].*

The expression "under the influence of *[an intoxicant] [marijuana] [a narcotic drug] [a drug producing stimulating effects on the central nervous system]*" covers not only all the well known and easily recognized conditions and degrees of intoxication, but also any mental or physical condition which is the result of taking *[an intoxicant] [marijuana] [a narcotic drug] [a drug producing stimulating effects on the central nervous system]* in any form and which deprives one of that clearness of mind and control of oneself which one would otherwise possess. In this situation, it would not be necessary that the person be in such a condition as would make *[him] [her]* guilty of public drunkenness. The law merely requires that the person be under the influence of *[an intoxicant] [marijuana] [a narcotic drug] [a drug producing stimulating effects on the central nervous system].* The degree of intoxication must be such that it impairs to any extent the driver's ability to operate a vehicle.

38.01(a) – DUI, etc.

a. See note above regarding 38.01, which will now be 38.01(a).

38.01(b) – DUI, etc. (for offenses committed on or after 1/1/11)

a. New instruction.

39.03 – Unlawful Photographing in Violation of Privacy

a. Delete the text of element #5 on page 1126 and substitute the following: that the individual in the photograph *[***for offenses committed on or after 1/1/11:** *had] [***for offenses committed prior to 1/1/11:** *was in a place where there was]* a reasonable expectation of privacy

b. Delete the definition of "photograph" and substitute the following: "Photograph" means any photograph or photographic reproduction, still or moving, or any videotape or live television transmission of any individual **[only use for offenses committed prior to 1/1/11:** so that such individual is readily identifiable].

c. Change the definition section so the definitions appear in the following order: disseminating, effective consent, photograph, knowingly, transition paragraph, intentionally.

40.02 – Defense: Intoxication

a. Add a comment with the following text: This instruction is required only if it is fairly raised in the proof that the defendant's intoxication was such that it compromised his/her capacity for whatever culpable mental state the offense required. *State v. Hatcher*, 310 S.W.3d 788, 815 n. 16 (Tenn. 2010).

40.03 – Defense: Duress

a. Add a comment with the following text: A criminal defendant is entitled to have the jury instructed on the defense of duress only if it is fairly raised by the proof. Because duress is a general rather than an affirmative defense, a criminal defendant need not establish the elements of duress by a preponderance of the evidence in order to merit a jury instruction. Rather, if admissible evidence fairly raises its applicability, the trial court is required to submit the defense to the jury. *State v. Hatcher*, 310 S.W.3d 788, 816-17 (Tenn. 2010).

40.06(b) – Defense: Self Defense (enacted 5/22/07)

a. Following the fourth paragraph, which ends with "and their relative strengths and sizes", add a new paragraph IN BRACKETS with the following text: If proof was offered by the defendant of a trait of **character** of the *[deceased] [alleged victim]* to show that the *[deceased] [alleged victim]* was the first aggressor, and proof was then offered by the State of a trait of character of the defendant to show that the defendant was the first aggressor, such proof offered by the State for that purpose can only be considered by you for the purpose of its effect, if any, in rebutting the defense proof that the *[deceased] [alleged victim]* was the first aggressor and that therefore the defendant acted in *[self-defense] [defense of a third person]*. It cannot be considered by you as evidence of *[his] [her]* predisposition to commit the offense for which *[he] [she]* is now on trial.

42.02 – Expert Witness

a. Add the following as a new bracketed paragraph between the second and third paragraphs in the existing instruction: [In giving *[his] [her]* opinion, _____ testified that *[he] [she]* took into consideration certain statements made by other persons. Because the statements were made outside the courtroom, they may be used by you only for evaluating the expert witness' opinion testimony, and cannot be relied on as proof of the truth of the matters asserted in those statements.]

b. After the closing bracket, add a footnote with the following text: This bracketed language should be used whenever inadmissible hearsay is allowed by the trial judge during expert testimony pursuant to Tenn. R. Evid. 703 and its Advisory Commission Comments. *See State v. Jordan*, 325 S.W.3d 1, 53-56 (Tenn. 2010).

42.03 – Evidence: Direct and Circumstantial

a. Delete the fourth paragraph (including the footnote), which appears at the bottom of page 1213 and begins with "[When the evidence is made up entirely of circumstantial evidence . . .."

b. Substitute the following: It is your duty to decide how much weight to give the direct and circumstantial evidence. The law makes no distinction between the weight that you should give to either one, or say that one is any better evidence than the other. You should consider all the evidence, both direct and circumstantial, and give it whatever weight you believe it deserves.

c. Delete Comment 1 and renumber Comment 2 as Comment 1.

42.03(a) – Alternative Instruction: Direct and Circumstantial Evidence

a. Delete the last sentence of the last paragraph on page 1215. This sentence begins "When the evidence is entirely circumstantial . . .."

b. Add a new paragraph at the end of the instruction with the following language: It is your duty to decide how much weight to give the direct and circumstantial evidence. The law makes no distinction between the weight that you should give to either one, or say that one is any better

evidence than the other. You should consider all the evidence, both direct and circumstantial, and give it whatever weight you believe it deserves.

42.20 – Inference from Possession of Recently Stolen Property

a. Following the first paragraph of this instruction, insert the following new paragraph: [Furthermore, if you find beyond a reasonable doubt from the evidence that the defendant gained possession of the property in question through theft, and you also find beyond a reasonable doubt that the theft could only have been accomplished through *[burglary] [robbery] [carjacking]*, you may also reasonably draw an inference that the defendant committed such offense, if this inference is substantiated by facts and circumstances which corroborate that the defendant actually committed the *[burglary] [robbery] [carjacking]* and was not merely a possessor of the stolen property. (INSERT FOOTNOTE 3 HERE) This corroborating evidence need only be slight, and need not by itself be sufficient to warrant an inference of guilt. As corroboration, you may consider *[the attributes of possession – time, place and manner] [that the defendant had an opportunity to commit the crime charged] [the defendant's conduct] [the defendant's false or contradictory statements, if any] [other statements the defendant may have made with reference to the property] [a false account of how the defendant acquired possession of the stolen property] [any other evidence which tends to connect the defendant with the crime charged]* **[The trial judge should delete any bracketed material which is not supported by the evidence]**.] (INSERT FOOTNOTE 4 HERE)

b. Text of new footnote 3: *State v. James*, 315 S.W.3d 440, 446-47 and 454 (Tenn. 2010).

c. Text of new footnote 4: *State v. James*, 315 S.W.3d 440, 454 n. 13 (Tenn. 2010).

d. Renumber existing footnotes accordingly.

e. In the first sentence of the next paragraph, which begins, "However, you are never required to make this inference", delete "this inference" and substitute the following: *[this inference] [these inferences]*

42.22 – Evidence of Mental State

a. Delete the text of footnote #3 and substitute the following: *State v. Hatcher*, 310 S.W.3d 788, 806-07 (Tenn. 2010); *State v. Phipps*, 883 S.W.2d 138, 150-51 (Tenn. Crim. App. 1994).

b. Delete the first line of Comment 1, and substitute the following: *State v. Phipps*, 883 S.W.2d 138, 150-51 (Tenn. Crim. App. 1994), does not mandate that this instruction be given.

c. Immediately after "warrant." at the end of Comment 1, add the following new text (in the same paragraph as "warrant"):

Our Supreme Court has stated that

> This pattern instruction makes clear that its use is contemplated when there has been proof that, at the time the defendant allegedly committed the crime, he or she was suffering from some mental disease or defect which affected his or her capacity to form the requisite mental state.

State v. Hatcher, 310 S.W.3d 788, 806-07 (Tenn. 2010) (holding that simple fear is not the type of mental disease or defect contemplated by a "diminished capacity" theory of defense.)

T.P.I. -- CRIM. 6.06

CRIMINAL EXPOSURE TO *[HIV] [HBV] [HCV]*

Any person who commits the offense of criminal exposure to *[HIV] [HBV] [HCV]* is guilty of a crime.

For you to find the defendant guilty of this offense, the state must have proven beyond a reasonable doubt the existence of the following essential elements:[1]

(1) that the defendant knew that *[he] [she]* was infected with *[HIV] [HBV] [HCV]*;

and

(2)(a) that the defendant knowingly engaged in intimate contact with another;

or

(b) that the defendant knowingly transferred, donated, or provided the defendant's own blood, tissue, semen, organs, or other potentially infectious bodily fluids or parts for transfusion, transplantation, insemination, or other administration to another in any manner that presents a significant risk of *[HIV] [HBV] [HCV]* transmission;

or

(c) that the defendant knowingly dispensed, delivered, exchanged, sold, or in any other way transferred to another any nonsterile intravenous or intramuscular drug paraphernalia.

There is no requirement that the state prove the actual transmission of *[HIV] [HBV] [HCV]* for you to find the defendant guilty of this offense.[2]

["HBV" means the hepatitis B virus.][3]

["HCV" means the hepatitis C virus.][4]

["HIV" means the human immunodeficiency virus or any other identified causative agent of acquired immunodeficiency syndrome.][5]

["Intimate contact with another" means the exposure of the body of one (1) person to the bodily fluid of another person in any manner that presents a significant risk of *[HIV] [HBV] [HCV]* transmission.][6]

["Intravenous or intramuscular drug paraphernalia" means any equipment, product, or material of any kind which is peculiar to and marketed for use in injecting a substance into the human body.][7]

"Knowingly" means that a person acts knowingly with respect to the conduct or to circumstances surrounding the conduct when the person is aware of the nature of the conduct or that the circumstances exist. A person acts knowingly with respect to a result of the person's conduct when the person is aware that the conduct is reasonably certain to cause the result.[8]

The requirement of "knowingly" is also established if it is shown that the defendant acted intentionally.[9]

"Intentionally" means that a person acts intentionally with respect to the nature of the conduct or to a result of the conduct when it is the person's conscious objective or desire to engage in the conduct or cause the result.[10]

[**only for offenses committed prior to 7/1/11:** Any alleged victim includes a fetus which was viable at the time of injury. A fetus shall be considered viable if it had achieved a stage of development wherein it could reasonably be expected to be capable of living outside the uterus.[11] For you to

find the defendant guilty of this offense committed upon a fetus, the state must have proven the viability of the fetus beyond a reasonable doubt.] [**only for offenses committed on or after 7/1/11:** Any alleged victim includes a fetus if at the time of the alleged criminal act a victim was pregnant.[12]]

[Included in the defendant's plea of not guilty is the defendant's plea that the alleged victim consented with knowledge to the *[HIV] [HBV] [HCV]* exposure.

It is a defense to prosecution for criminal exposure to *[HIV] [HBV] [HCV]*:[13]

(1) that the alleged victim knew that the defendant was infected with *[HIV] [HBV] [HCV]*;

and

(2) that the alleged victim knew that the action of the defendant could result in infection with *[HIV] [HBV] [HCV]*;

and

(3) that the alleged victim gave advance consent to the defendant's action with said knowledge.

The burden of proof on this issue is upon the defendant to prove the defense by a preponderance[14] of the evidence.[15] If you find that the defendant has proven the defense by a preponderance of the evidence, then you must find the defendant not guilty.]

COMMENTS

1. Criminal exposure to HIV is a Class C felony. T.C.A. § 39-13-109(e)(1). Criminal exposure to HBV or HCV is a Class A misdemeanor, punishable by a fine of not more than one thousand dollars ($1,000), restitution to the victim or victims, or both a fine and restitution. In addition, a victim of criminal exposure to HBV or HCV may maintain an action for the expenses and the actual loss of service resulting from such exposure.

T.C.A. § 39-13-109(e)(2).

2. The state is not required to negate the existence of an affirmative defense in the charging instrument alleging commission of the offense. The issue of the existence of an affirmative defense may not be submitted to the jury unless it is fairly raised by the proof and notice has been provided according to T.C.A. § 39-11-204(c). If the issue of the existence of an affirmative defense is submitted to the jury, the court shall instruct the jury that the affirmative defense must be established by a preponderance of the evidence. T.C.A. § 39-11-204.

3. An instruction as to "effective consent" as defined by T.C.A. § 39-11-106(a)(9) may be applicable. The trial judge may also wish to utilize T.P.I. – Crim. 40.17, Defense: Effective Consent.

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[1] T.C.A. § 39-13-109(a).
[2] T.C.A. § 39-13-109(d).
[3] T.C.A. § 39-13-109(a).
[4] T.C.A. § 39-13-109(a).
[5] T.C.A. § 39-13-109(b)(1).
[6] T.C.A. § 39-13-109(b)(2).
[7] T.C.A. § 39-13-109(b)(3).
[8] T.C.A. § 39-11-106(a)(20).
[9] T.C.A. § 39-11-301(a)(2).
[10] T.C.A. § 39-11-106(a)(31).
[11] T.C.A. § 20-5-106(c); T.C.A. § 39-13-107; *Planned Parenthood v. Sundquist*, 38 S.W.3d 1, 17 (Tenn. 2000).
[12] T.C.A. § 39-13-107, amended eff. 7/1/11, no longer requires that the fetus be viable to be considered a victim.
[13] T.C.A. § 39-13-109(c).
[14] The trial judge should instruct the jury concerning "preponderance of the evidence." T.P.I. – Crim. 42.01, Preponderance of evidence.
[15] T.C.A. § 39-11-204.

T.P.I. – CRIM. 7.08(d)

VEHICULAR HOMICIDE (DRAG RACING)

Any person who commits the offense of vehicular homicide is guilty of a crime.

For you to find the defendant guilty of this offense, the state must have proven beyond a reasonable doubt the existence of the following essential elements:[1]

(1) that the defendant killed the alleged victim by the operation of a motor vehicle;

and

(2) that the defendant acted recklessly;

and

(3) that the killing was the proximate result of conduct constituting the offense of drag racing.

For you to find the defendant's conduct constituted the offense of drag racing, the state would have to prove beyond a reasonable doubt that the defendant operated a motor vehicle *[upon the public highways of this state] [on the premises of any shopping center, trailer park, any apartment house complex, or any other premises generally frequented by the public at large]* for the purpose of drag racing.[2]

"Drag racing" means:

(A) The use of any motor vehicle for the purpose of ascertaining the maximum speed obtainable by the vehicle;

(B) The use of any motor vehicle for the purpose of ascertaining the highest obtainable speed of the vehicle within a certain distance or within a certain time limit;

(C) The use of any one (1) or more motor vehicles for the purpose of comparing the relative speeds of such vehicle or vehicles, or for comparing the relative speeds of such vehicle or vehicles within a certain distance or within a certain time limit;

(D) The use of one (1) or more motor vehicles in an attempt to outgain, outdistance or to arrive at a given destination simultaneous with or prior to that of any other motor vehicle; or

(E) The use of any motor vehicle for the purpose of the accepting of, or the carrying out of any challenge, made orally, in writing, or otherwise, made or received with reference to the performance abilities of one (1) or more motor vehicles.[3]

"Motor vehicle" means every vehicle, including a low-speed vehicle or a medium-speed vehicle, that is self-propelled excluding motorized bicycles, and every vehicle, including a low-speed vehicle or a medium-speed vehicle, that is propelled by electric power obtained from overhead trolley wires, but not operated upon rails. "Low-speed vehicle" means any four-wheeled electric vehicle, excluding golf carts, whose top speed is greater than twenty miles per hour (20 mph) but not greater than twenty-five miles per hour (25 mph), including neighborhood vehicles. "Medium-speed vehicle" means any four-wheeled electric or gasoline-powered vehicle, excluding golf carts, whose top speed is greater than thirty miles per hour (30 mph) but not more than thirty-five miles per hour (35 mph). "Vehicle" means every device in, upon or by which any person or property is or may be transported or drawn upon a highway, excepting devices used exclusively upon stationary rails or tracks. **[The words "or a medium-speed vehicle"**

and the definition of "medium-speed vehicle" only apply to offenses committed on or after 7/1/08][4]

"Proximate result" means a result, which in natural and continuous sequence, is a product of an act occurring or concurring with another, which, had it not happened, the result would not have occurred.[5]

["Public highways" means all of the streets, roads, highways, expressways, bridges and viaducts, including any and all adjacent rights-of-way thereto, which are owned, constructed, and/or maintained by the state of Tennessee, and/or any municipality or political subdivision of the state of Tennessee, and any and all highways, roads, streets, etc., which have been dedicated to the public use.][6]

"Recklessly" means that a person acts recklessly with respect to circumstances surrounding the conduct or the result of the conduct when the person is aware of, but consciously disregards, a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the accused person's standpoint.[7]

The requirement of "recklessly" is also established if it is shown that the defendant acted knowingly or intentionally.[8]

"Knowingly" means that a person acts knowingly with respect to the conduct or to circumstances surrounding the conduct when the person is aware of the nature of the conduct or that the circumstances exist. A person acts knowingly with respect to a result of the person's conduct when the person is aware that the conduct is reasonably certain to cause the result.[9]

"Intentionally" means that a person acts intentionally with respect to the nature of the conduct or the result of the conduct when it is the person's conscious objective or desire to engage in the conduct or cause the result.[10]

[If recklessness establishes an element of an offense and the person is unaware of the risk because of voluntary intoxication, the person's unawareness is immaterial in a prosecution for that offense.[11] Voluntary intoxication means intoxication caused by a substance that the person knowingly introduced into the person's body, the tendency of which to cause intoxication was known or ought to have been known.[12]]

[**only for offenses committed prior to 7/1/11:** Any alleged victim includes a fetus which was viable at the time of injury. A fetus shall be considered viable if it had achieved a stage of development wherein it could reasonably be expected to be capable of living outside the uterus.[13] For you to find the defendant guilty of this offense committed upon a fetus, the state must have proven the viability of the fetus beyond a reasonable doubt.] [**only for offenses committed on or after 7/1/11:** Any alleged victim includes a fetus if at the time of the alleged criminal act a victim was pregnant.[14]]

[It is a defense to prosecution for this offense that the alleged drag racing occurred on premises which were properly licensed for such purpose.][15]

COMMENTS

1. Vehicular homicide which is the proximate result of conduct constituting the offense of drag racing is a Class C felony. T.C.A. § 39-13-213(b)(1).
2. A violation of T.C.A. § 39-15-401, child abuse and neglect, may be a lesser included offense of vehicular homicide. T.C.A. § 39-15-401(f).

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[1] T.C.A. § 39-13-213(a)(3) and T.C.A. § 55-10-502.
[2] See T.C.A. § 55-10-502 and T.P.I. – Crim. 38.21.

[3] T.C.A. § 55-10-501(1).
[4] T.C.A. § 55-8-101.
[5] The definition of "proximate result" is based on the definition of "proximate cause," as set forth in T.P.I. – Crim. 7.05(b), Second degree murder (drugs as proximate cause).
[6] T.C.A. § 55-10-501(3).

[7] T.C.A. § 39-11-106(a)(31).
[8] T.C.A. § 39-11-301(a)(2).
[9] T.C.A. § 39-11-106(a)(20).
[10] T.C.A. § 39-11-106(a)(18).
[11] T.C.A. § 39-11-503(b).
[12] T.C.A. § 39-11-503(d)(3).
[13] T.C.A. § 20-5-106(c); T.C.A. § 39-13-214; *Planned Parenthood v. Sundquist*, 38 S.W.3d 1, 17 (Tenn. 2000).
[14] T.C.A. § 39-13-214, amended eff. 7/1/11, no longer requires that the fetus be viable to be considered a victim.
[15] T.C.A. § 55-10-502(a).

T.P.I. – CRIM. 7.08(e)

VEHICULAR HOMICIDE (CONSTRUCTION ZONE)

Any person who commits the offense of vehicular homicide is guilty of a crime.

For you to find the defendant guilty of this offense, the state must have proven beyond a reasonable doubt the existence of the following essential elements:[1]

(1) that the defendant killed the alleged victim by the operation of a *[motor vehicle] [automobile] [airplane] [motorboat]*;

and

(2) that the defendant acted recklessly;

and

(3) that the killing was the proximate result of conduct in a posted construction zone where the alleged victim was *[an employee of the department of transportation] [a highway construction worker].*

"Proximate result" means a result, which in natural and continuous sequence, is a product of an act occurring or concurring with another, which, had it not happened, the result would not have occurred.[2]

"Recklessly" means that a person acts recklessly with respect to circumstances surrounding the conduct or the result of the conduct when the person is aware of, but consciously disregards, a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the accused person's standpoint.[3]

The requirement of "recklessly" is also established if it is shown that the defendant acted knowingly or intentionally.[4]

"Knowingly" means that a person acts knowingly with respect to the conduct or to circumstances surrounding the conduct when the person is aware of the nature of the conduct or that the circumstances exist. A person acts knowingly with respect to a result of the person's conduct when the person is aware that the conduct is reasonably certain to cause the result.[5]

"Intentionally" means that a person acts intentionally with respect to the nature of the conduct or the result of the conduct when it is the person's conscious objective or desire to engage in the conduct or cause the result.[6]

[If recklessness establishes an element of an offense and the person is unaware of the risk because of voluntary intoxication, the person's unawareness is immaterial in a prosecution for that offense.[7] Voluntary intoxication means intoxication caused by a substance that the person knowingly introduced into the person's body, the tendency of which to cause intoxication was known or ought to have been known.[8]]

[**only for offenses committed prior to 7/1/11:** Any alleged victim includes a fetus which was viable at the time of injury. A fetus shall be considered viable if it had achieved a stage of development wherein it could reasonably be expected to be capable of living outside the uterus.[9] For you to find the defendant guilty of this offense committed upon a fetus, the state must have proven the viability of the fetus beyond a reasonable doubt.] [**only for offenses committed on or after 7/1/11:** Any alleged victim includes a fetus if at the time of the alleged criminal act a victim was pregnant.[10]]

COMMENTS

1. Vehicular homicide which is the proximate result of conduct in a construction zone is a Class D felony. T.C.A. § 39-13-213(b)(3).
2. A violation of T.C.A. § 39-15-401, child abuse and neglect, may be a lesser included offense of vehicular homicide. T.C.A. § 39-15-401(f).

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[1] T.C.A. § 39-13-213(a)(4).
[2] The definition of "proximate result" is based on the definition of "proximate cause," as set forth in T.P.I. – Crim. 7.05(b), Second degree murder (drugs as proximate cause).
[3] T.C.A. § 39-11-106(a)(31).
[4] T.C.A. § 39-11-301(a)(2).
[5] T.C.A. § 39-11-106(a)(20).
[6] T.C.A. § 39-11-106(a)(18).
[7] T.C.A. § 39-11-503(b).
[8] T.C.A. § 39-11-503(d)(3).
[9] T.C.A. § 20-5-106(c); T.C.A. § 39-13-214; *Planned Parenthood v. Sundquist*, 38 S.W.3d 1, 17 (Tenn. 2000).
[10] T.C.A. § 39-13-214, amended eff. 7/1/11, no longer requires that the fetus be viable to be considered a victim.

T.P.I. – CRIM. 10.17(b)

VIOLATION OF SEX OFFENDER RESIDENTIAL OR WORK RESTRICTIONS

(for offenses committed on or after August 17, 2009)

Any person who violates sex offender residential or work restrictions is guilty of a crime.

For you to find the defendant guilty of this offense, the state must have proven beyond a reasonable doubt the existence of the following essential elements:[1]

(1) that the defendant had a conviction for [_____] *[insert in this blank space a criminal offense or offenses listed in Tenn. Code Ann. § 40-39-202 as a "Sex Offense" or "Violent Sex Offense." See Comment 2.]*;

and

(2)(a) that the defendant, whose victim was a minor, knowingly *[established a primary or secondary residence or any other living accommodation] [accepted employment] [obtained sexual offender treatment or attended a sexual offender treatment program]* within one thousand feet (1,000') of the property line on which a *[public school] [private or parochial school] [licensed day care center] [child care facility] [public park, playground, recreation center or public athletic field available for use by the general public]* was located;

or

(b) that the defendant knowingly *[established a primary or secondary residence or any other living accommodation] [accepted employment]* within one thousand feet (1,000') of the property line on which the defendant's former *[victim] [victim's immediate family members]* reside(d);

or

(c) that the defendant knowingly came within one hundred feet (100') of any of the defendant's former victims, except as otherwise authorized by law;

or

(d) that the defendant, whose victim was a minor, knowingly *[established a primary or secondary residence or any other living accommodation] [resided]* where a minor resided;

or

(e) that the defendant knowingly contacted *[a former victim] [a former victim's immediate family member]* without the consent of the victim;

or

(f) that the defendant knowingly contacted a former victim without consent of the victim's parent or guardian, while the victim was a minor being contacted by *[telephone] [in writing] [by electronic mail] [internet services] [any form of electronic communication]*;

or

(g) that the defendant *[was] [remained]* on the premises of any building or grounds of a *[public school] [private or parochial school]*

[licensed day care center] [child care facility] [public park] [playground] [recreation center] [public athletic field available for use by the general public] when the offender had reason to believe children under eighteen (18) years of age were present;

or

(h) that the defendant *[stood or sat idly, whether or not in a vehicle] [remained]* within one thousand feet (1,000') of the property line of any building owned or operated by a *[public school] [private or parochial school] [licensed day care center] [child care facility] [public park] [playground] [recreation center] [public athletic field available for use by the general public]* when children under eighteen (18) years of age are present, while not having a reason or relationship involving custody of or responsibility for a child or any other specific or legitimate reason for being there;

or

(i) that the defendant was in any conveyance *[owned] [leased] [contracted]* by a *[school] [licensed day care center] [child care facility] [recreation center]* to transport students to or from school, day care, child care, or a recreation center or any related activity thereof when children under eighteen (18) years of age were present in the conveyance;

or

(j) **only for offenses committed on or after 7/1/10, but prior to 5/27/11:** that the defendant established a primary or secondary residence *[with two (2) or more persons] [where two (2) or more*

persons then resided] who had convictions for [_____] *[insert in this blank space a criminal offense or offenses listed in Tenn. Code Ann. § 40-39-202 as a "Sex Offense" or "Violent Sex Offense." See Comment 2.]*;

or

only for offenses committed on or after 5/27/11: that the *defendant [established a primary or secondary residence together] [inhabited the same primary or secondary residence at the same time]* with two (2) or more persons who had convictions for [_____] and [_____] *[insert in this blank space criminal offenses listed in Tenn. Code Ann. § 40-39-202 as a "Sex Offense" or "Violent Sex Offense." See Comment 2.]*;

or

(k) **only for offenses committed on or after 7/1/10:** that the defendant knowingly permitted more than three (3) persons who had convictions for [_____] *[insert in this blank space a criminal offense or offenses listed in Tenn. Code Ann. § 40-39-202 as a "Sex Offense" or "Violent Sex Offense." See Comment 2.]*, or a combination thereof, to establish a primary or secondary residence in any house, apartment or other habitation, owned or under the control of such defendant.

[It is a defense to *[establishing a primary or secondary residence or any other living accommodation] [accepting employment]* within one thousand feet (1,000') of the property line on which [a *[public school] [private or parochial school] [licensed day care center] [child care facility]* is located] [the defendant's

former *[victim] [victim's immediate family members]* reside(d)] that the violation was caused by a change in ownership or use of property after the defendant *[established residence] [accepted employment].*][2]

[It is a defense to residing where a minor resides if the defendant is a parent of the minor *[unless the offender's parental rights have been or were in the process of being terminated as provided by law] [unless any minor or adult child of the offender was a victim of [_____] committed by the offender]. [Insert in this blank space a criminal offense or offenses listed in Tenn. Code Ann. § 40-39-202 under the definition of "Sex Offender" or "Violent Sex Offender." See Comment 2.]*][3]

[It is a defense to being *[on or near a [public school] [private or parochial school] [licensed day care center] [child care facility] [public park] [playground] [recreation center] [public athletic field available for use by the general public]] [in a conveyance]* that the defendant:

(A) Was a student in attendance at the school;

(B) **Only for offenses committed prior to 7/1/10:** Was attending a *[conference] [scheduled event]* with *[school] [day care] [child care] [park] [playground] [recreation center]* officials as a parent or legal guardian of a child who was enrolled and participating in the *[conference] [scheduled event]* of the *[school] [day care center] [child care center] [park] [playground] [recreation center].* [This defense shall not apply if the victim of the offender's *[sexual offense] [violent sexual offense]* was a minor at the time of the offense and the victim was enrolled in the *[school] [day care center] [recreation center] [child care center]* that was participating in the conference or other scheduled event.];

(B) **Only for offenses committed on or after 7/1/10:** Was attending a conference with *[school] [day care] [child care] [park] [playground] [recreation center]* officials as a parent or legal guardian of a child who was [*enrolled in the [school] [day care center] [child care center]*] [*a participant at the [park] [playground] [recreation center]*] and had received written permission or a request from the *[school's principal] [facility's administrator].* [This defense shall not apply if the victim of the offender's *[sexual offense] [violent sexual offense]* was a minor at the time of the offense and the victim was enrolled in the *[school] [day care center] [recreation center] [child care center]* that was participating in the conference or other scheduled event.];

(C) Resided at a state licensed or certified facility for *[incarceration] [health or convalescent care]*; or

(D) Was dropping off or picking up *[a child] [children]* and the defendant was the *[child] [children's]* parent or legal guardian [**only for offenses committed on or after 7/1/10:** who had provided written notice of the defendant's offender status to the school's principal or a school administrator upon enrollment.]][4]

["Conviction" means a judgment entered by a Tennessee court upon a plea of guilty, a plea of nolo contendere, a finding of guilt by a jury or the court notwithstanding any pending appeal or habeas corpus proceeding arising from such judgment. A "conviction" includes, but is not limited to, a conviction by a federal court or military tribunal, including courts-martial conducted by the armed forces of the United States, and a conviction, whether upon a plea of guilty, a plea of nolo contendere, or a finding of guilt by a jury or the court in any other

state of the United States, other jurisdiction or other country. A conviction, whether upon a plea of guilty, a plea of nolo contendere, or a finding of guilt by a jury or the court for an offense committed in another jurisdiction that would be classified as a "sexual offense" or a "violent sexual offense" if committed in this state shall be considered a "conviction" for the purposes of this offense. "Conviction," for the purposes of this part, also includes a plea taken in conjunction with § 40-35-313 or its equivalent in any other jurisdiction.][5]

["Habitation":

(A) Means any structure, including buildings, module units, mobile homes, trailers, and tents, which is designed or adapted for the overnight accommodation of persons;

(B) Includes a self-propelled vehicle that is designed or adapted for the overnight accommodation of persons and is actually occupied at the time of initial entry by the defendant; and

(C) Includes each separately secured or occupied portion of the structure or vehicle and each structure appurtenant to or connected with the structure or vehicle.][6]

["Minor" means any person under eighteen (18) years of age.][7]

["Owner" means a person in lawful possession of property whether the possession is actual or constructive. "Owner" does not include a person, who is restrained from the property or habitation by a valid court order or order of protection, other than an *ex parte* order of protection, obtained by the person maintaining residence on the property.][8]

"Knowingly" means that a person acts knowingly with respect to the conduct or to circumstances surrounding the conduct when the person is aware

of the nature of the conduct or that the circumstances exist. A person acts knowingly with respect to a result of the person's conduct when the person is aware that the conduct is reasonably certain to cause the result.[9]

The requirement of "knowingly" is also established if it is shown that the defendant acted intentionally.[10]

"Intentionally" means that a person acts intentionally with respect to the nature of the conduct or to a result of the conduct when it is the person's conscious objective or desire to engage in the conduct or cause the result.[11]

COMMENTS

1. Violation of sex offender residential or work restrictions is a Class E felony. T.C.A. § 40-39-211(f). A first offense is punishable by a fine of not less than three hundred fifty dollars ($350) and imprisonment for not less than ninety (90) days. A second offense is punishable by a fine of not less than six hundred dollars ($600) and imprisonment for not less than one hundred eight (180) days. A third or subsequent offense is punishable by a fine of not less than one thousand one hundred dollars ($1,100) and imprisonment for not less than one (1) year. T.C.A. § 40-39-211(g). No person violating this part shall be eligible for suspension of sentence, diversion or probation until the minimum sentence is served in its entirety. A violation of a parent or legal guardian due solely to a lack of having received written permission required to attend a conference shall be punishable by fine only. T.C.A. § 40-39-211(g)(4).

2. As the list of sex offenses and violent sex offenses contained in Tenn. Code Ann. § 40-39-202 has been amended numerous times by the legislature, it is suggested that the trial judge consult the appropriate pocket part to make sure that the conviction offense is one actually listed on the date of the violation alleged in the indictment.

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[1] T.C.A. § 40-39-211.
[2] T.C.A. § 40-39-211(e).
[3] T.C.A. § 40-39-211(c).
[4] T.C.A. § 40-39-211(d)(2).
[5] T.C.A. § 40-39-202(2). It is the opinion of some members of the Committee that the trial judge should decide prior to trial whether or not a defendant's conviction qualifies as an element of this offense as a matter of law, rather than submitting it as a fact to be determined by the jury during trial. If this procedure is followed, the definition of "conviction" should be omitted from this instruction.
[6] T.C.A. § 39-14-401(1).
[7] T.C.A. § 40-39-202(8).
[8] T.C.A. § 39-14-401(3).
[9] T.C.A. § 39-11-106(a)(20).
[10] T.C.A. § 39-11-301(a)(2).

[11] T.C.A. § 39-11-106(a)(18).

T.P.I. - CRIM. 10.20

VIOLATION OF COMMUNITY SUPERVISION

Any person who commits the offense of violation of community supervision is guilty of a crime.

For you to find the defendant guilty of this offense, the state must have proven beyond a reasonable doubt the existence of the following essential elements:[1]

(1) that the Tennessee Board of Probation and Parole had placed the defendant on community supervision;

and

(2) that the defendant's conduct violated a condition of community supervision that had been imposed upon the defendant;

and

(3) that the defendant did so knowingly.

[and

(4) that the conduct constituted _____(insert felony offense)_____.

[Include here the elements of the felony offense.]]

"Knowingly" means that a person acts knowingly with respect to the conduct or to the circumstances surrounding the conduct when the person is aware of the nature of the conduct or that the circumstances exist. A person acts knowingly with respect to a result of the person's conduct when the person is aware that the conduct is reasonably certain to cause the result.[2]

The requirement of "knowingly" is also established if it is shown that the defendant acted intentionally.[3]

"Intentionally" means that a person acts intentionally with respect to the nature of the conduct or to a result of the conduct when it is the person's conscious objective or desire to engage in the conduct or cause the result.[4]

COMMENTS

1. If the conduct that is a violation of a condition of community supervision does not constitute a criminal offense or constitutes a criminal offense which is classified as a misdemeanor, the violation is a Class A misdemeanor. If it constitutes a criminal offense that is classified as a felony, the violation is a Class E felony. T.C.A. § 39-13-526(b). If the violation of community supervision involves the commission of a new offense, the sentence "shall be served consecutive to any sentence received for commission of the new offense." T.C.A. § 39-13-526(c).
2. The venue for a violation of community supervision shall be in the county where the person was being supervised at the time of the violation and this venue shall include those persons placed on supervision in this state but who are being monitored in another state. T.C.A. § 39-13-526(d).

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[1] T.C.A. §§ 39-13-524(d) and 39-13-526(a).
[2] T.C.A. § 39-11-106(a)(20).
[3] T.C.A. § 39-11-301(a)(2).
[4] T.C.A. § 39-11-106(a)(18).

T.P.I. – CRIM. 10.21

SEXUAL CONTACT BY AN AUTHORITY FIGURE

Any person who commits the offense of sexual contact by an authority figure is guilty of a crime.

For you to find the defendant guilty of this offense, the state must have proven beyond a reasonable doubt the existence of the following essential elements:[1]

(1) that the defendant engaged in unlawful sexual contact with the alleged victim in which the defendant intentionally touched or kissed the victim's lips with the defendant's lips;[2]

and

(2) that the victim was at least thirteen (13) but less than eighteen (18) years of age and the defendant was at least four (4) years older than the victim;

and

(3)(a) that the defendant had, at the time of the alleged unlawful sexual contact, *[supervisory] [disciplinary]* power over the victim by virtue of the defendant's *[legal] [professional] [occupational]* status;

or

(b) that the defendant was, at the time of the alleged unlawful sexual contact, in a position of trust;

and

(4) that the defendant used such *[power] [trust]* to accomplish the sexual contact;

and

(5) that the defendant acted either intentionally, knowingly or recklessly.[3]

["Disciplinary power" means the power to demand obedience through the use or threat of punishment.][4]

"Sexual contact" means the defendant intentionally touched or kissed the minor's lips with the defendant's lips if such touching can be reasonably construed as being for the purpose of sexual arousal or gratification.[5]

["Supervisory power" means the power to direct the actions of another.][6]

"Intentionally" means that a person acts intentionally with respect to the nature of the conduct or to a result of the conduct when it is the person's conscious objective or desire to engage in the conduct or cause the result.[7]

"Knowingly" means that a person acts knowingly with respect to the conduct or to circumstances surrounding the conduct when the person is aware of the nature of the conduct or that the circumstances exist. A person acts knowingly with respect to a result of the person's conduct when the person is aware that the conduct is reasonably certain to cause the result.[8]

"Recklessly" means that a person acts recklessly with respect to circumstances surrounding the conduct or the result of the conduct when the person is aware of, but consciously disregards, a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the accused person's standpoint.[9]

COMMENTS

1. Sexual contact by an authority figure is a Class A misdemeanor with a mandatory minimum fine of one thousand dollars ($1,000). T.C.A. § 39-13-533(c).
2. Each instance of unlawful sexual contact shall be considered a separate offense. T.C.A. § 39-13-533(d).
3. A violation of T.C.A. § 39-15-401, child abuse and neglect, may be a lesser included offense of sexual contact by an authority figure. T.C.A. § 39-15-401(f).

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[1] T.C.A. § 39-13-533.
[2] See T.P.I. 10.04(b), footnote 2, for an explanation of why the culpable mental state of "intentionally" must be set out clearly in element one of this instruction.
[3] Although the statute expressly provides that the sexual contact must be intentional, it neither sets out nor plainly dispenses with any culpable mental state required for the other elements of this offense, so that mere reckless conduct is sufficient. State v. Scott, 275 S.W.3d 395, 401 n.3 (Tenn. 2009).
[4] State v. Denton, 149 S.W.3d 1, 18-19 (Tenn. 2004).
[5] T.C.A. § 39-13-533(b).
[6] State v. Denton, 149 S.W.3d 1, 19 (Tenn. 2004).
[7] T.C.A. § 39-11-106(a)(18).
[8] T.C.A. § 39-11-106(a)(20).
[9] T.C.A. § 39-11-106(a)(31).

T.P.I. – CRIM. 11.42

TENNCARE FRAUD

Any person who commits the offense of TennCare fraud is guilty of a crime.

For you to find the defendant guilty of this offense, the state must have proven beyond a reasonable doubt the existence of the following essential elements:[1]

[Part A:

(1) that the defendant *[obtained] [attempted to obtain] [aided or abetted any person to obtain] [TennCare medical assistance benefits] [any assistance provided pursuant to any rule, regulation, procedure, or statute governing TennCare] [to which such person is not entitled] [of a greater value than that to which such person is authorized]*;

and

(2) that this act was done *[by means of a willfully false statement, representation, or impersonation] [by concealment of any material fact] [by fraudulent means] [in a manner not authorized by any rule, regulation, or statute governing TennCare]*;

and

(3) that the defendant acted knowingly.]

or

[Part B:

(1) that the defendant *[obtained] [attempted to obtain] [aided or abetted any person to obtain] TennCare benefits resulting in the assessment of a lower monthly premium than the person would be required to pay if not for the false statement or concealment of a material fact*;

and

(2) that this act was done by *[making a willfully[2] false statement] [concealing a material fact relating to personal or household income]*;

and

(3) that the defendant acted knowingly.]

or

[Part C:

(1) that the defendant *[obtained] [attempted to obtain] [aided or abetted any person to obtain]* controlled substance benefits;

and

(2) that this act was done by failing to disclose to *[a physician] [a nurse practitioner] [ancillary staff] [a health care provider]* from whom the person obtains a *[controlled substance] [prescription for a controlled substance]* that the person has received *[the same controlled substance] [a prescription for the same controlled substance] [a controlled substance of similar therapeutic use] [a prescription for a controlled substance of similar therapeutic use]* from another practitioner within the previous thirty (30) days and the

defendant used TennCare to pay for *[the clinical visit] [payment of the controlled substances]*;

and

(3) that the defendant acted knowingly, willfully[3] and with the intent to deceive.]

[The trial judge may wish to utilize T.P.I. – Crim. 4.01, Criminal Attempt.]

[An aider and abettor is one who advises, counsels, procures or encourages another to commit a crime.][4]

["Knowingly" means that a person acts knowingly with respect to the conduct or to circumstances surrounding the conduct when the person is aware of the nature of the conduct or that the circumstances exist. A person acts knowingly with respect to a result of the person's conduct when the person is aware that the conduct is reasonably certain to cause the result.][5]

COMMENTS

1. TennCare fraud is a Class E felony. T.C.A. § 71-5-2601(a)(1)(B).

2. Former T.P.I. – Crim. 3.02, Aiding and abetting, read as follow:

> All persons aiding and abetting, or ready and consenting to aid and abet in any criminal offense, shall be guilty of a crime. An aider and abettor is one who advises, counsels, procures or encourages another to commit a crime.
>
> The law does not require a strict, actual eyewitness presence at the scene of the crime. Only a constructive presence is necessary to charge one as an aider and abettor. As a general rule, one is deemed to be constructively present if he or she is at the time performing any act in the furtherance of a felony, or is in a position to give information which would prevent others from discouraging and stopping the perpetrator. It is immaterial at what distance the alleged aider and abettor may be from the scene of the crime. A very common example of constructive presence is where one, at the scene of the crime, "keeps watch" in order to give warning of the approach of danger, or provides transportation so as to facilitate the escape of the actual perpetrator of the crime.

Constructive or actual presence, however, is not sufficient to make one a principal of the crime. There must be some evidence, at least circumstantial, that the defendant knowingly participated in the crime. The defendant must have had knowledge of the crime being committed, and an intent to aid and abet. An aider and abettor who has knowledge of the principal's unlawful intent and assists the principal, is guilty in the same degree as the principal. When the aider and abettor does not share in the principal's intent, however, but is controlled by his or her own intent, the degree of guilt of the aider and abettor is not necessarily that of the principal. In determining the degree of the defendant's guilt, you should consider *[his] [her]* criminal intent and not the intent and degree of guilt of the principal offender whom the defendant is accused of aiding and abetting. (footnotes omitted).

3. "Willful" is not defined in the statute. If there is a jury question about its meaning, although the trial judge may not have to define it (*See State v. Butler*, 900 S.W.2d 305, 310 (Tenn. Crim. App. 1994)), the meaning of "willful" has generally been equated with the meaning of "intentional." *State v. Electroplating, Inc.*, 990 S.W.2d 211, 221 n.9 (Tenn. Crim. App. 1998). The trial judge may also wish to utilize the definition of "willful" in the pattern jury instruction on Reckless Driving, T.P.I. – Crim. 38.12.

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[1] T.C.A. § 71-5-2601(a)(1)(A).

[2] See Comment 3.

[3] See Comment 3.

[4] *Flippen v. State*, 211 Tenn. 507, 514, 365 S.W.2d 895, 899 (1963). The trial judge may want to charge former T.P.I. – Crim. 3.02, Aiding and Abetting, in its entirety. See Comment 2.

[5] As TennCare fraud is a Title 71 offense, the definition of "knowingly" contained in Tenn. Code Ann. § 39-11-106(a)(20) does not strictly apply. Tenn. Code Ann. § 39-11-106 begins with the language "As used in this part," and so the definitions contained in that statute only apply to Title 39 offenses. Upon agreement of the parties, it is recommended that a definition of "knowingly" be included in the written charge. The court may desire to refer to Title 39 for the definition.

T.P.I. -- CRIM. 21.01(c)

AGGRAVATED CHILD *[ABUSE] [NEGLECT]*

(for offenses committed on or after 7/1/09)

Any person who commits the offense of aggravated child *[abuse] [neglect]* is guilty of a crime.

For you to find the defendant guilty of this offense, the state must have proven beyond a reasonable doubt the existence of the following essential elements:[1]

[Part A:

(1) that the defendant knowingly, other than by accidental means, treated a child under eighteen (18) years of age in such a manner as to inflict injury;

and

(2)(a) that the act of abuse resulted in serious bodily injury to the child;

or

(b) that a *[deadly weapon] [dangerous instrumentality] [controlled substance]* was used to accomplish the act;

or

(c) that the act of abuse *[was especially heinous, atrocious or cruel] [involved the infliction of torture to the victim]*;

or

(d) **[only for offenses committed on or after 7/1/11:** that the act of abuse resulted from the knowing exposure of the child to the initiation of a process intended to result in the manufacture of methamphetamine.**]**

[and

(3) that the child was *[eight (8) years of age or less] [vulnerable because the child was [mentally defective] [mentally incapacitated] [suffering from a physical disability]]*.]]

or

[Part B:

(1) that the defendant knowingly neglected a child under eighteen (18) years of age so as to adversely affect the child's health and welfare;

and

(2)(a) that the act of neglect resulted in serious bodily injury to the child;

or

(b) that a *[deadly weapon] [dangerous instrumentality] [controlled substance]* was used to accomplish the act;

or

(c) that the act of neglect *[was especially heinous, atrocious or cruel] [involved the infliction of torture to the victim]*;

or

(d) **[only for offenses committed on or after 7/1/11:** that the act of neglect or endangerment resulted from the knowing exposure of the child to the initiation of a process intended to result in the manufacture of methamphetamine.**]**

[and

(3) that the child was *[eight (8) years of age or less] [vulnerable because the child was [mentally defective] [mentally incapacitated] [suffering from a physical disability]]*.]]

["Adversely affect the child's health and welfare" may include, but not be limited to, the natural effects of starvation or dehydration.][2]

"Child" means a person under eighteen (18) years of age.[3]

["Controlled substance" means a drug, substance, or immediate precursor in Schedules I through VI of §§ 39-17-403 — 39-17-415. [_____] is a *[drug] [substance] [immediate precursor]* in Schedules I through VI of §§ 39-17-403 — 39-17-415.][4]

[A "dangerous instrumentality" is any item that in the manner of its use or intended use as applied to a child is capable of producing serious bodily injury to a child.][5]

["Deadly weapon" means a firearm or anything manifestly designed, made, or adapted for the purpose of inflicting death or serious bodily injury; or anything that in the manner of its use or intended use is capable of causing death or serious bodily injury.][6]

["Heinous" means grossly wicked or reprehensible, abominable; odious; vile. "Atrocious" means extremely evil or cruel; monstrous; exceptionally bad; abominable. "Cruel" means disposed to inflict pain or suffering; causing suffering; painful.][7]

["Injury" includes a cut, abrasion, bruise, burn or disfigurement, and physical pain or temporary illness or impairment of the function of a bodily member, organ, or mental faculty.][8]

[To constitute "neglect," the state must prove beyond a reasonable doubt that there was an actual adverse effect to the child's health and welfare. A mere risk of harm is not sufficient.[9] Neglect is a continuing course of conduct beginning with the first

act or omission that causes adverse effects to a child's health and welfare, and can be an act of commission or omission.[10]]

["Serious bodily injury" means bodily injury that involves a substantial risk of death; protracted unconsciousness; extreme physical pain; protracted or obvious disfigurement; or protracted loss or substantial impairment of a function of a bodily member, organ or mental faculty or a broken bone of a child who is eight (8) years of age or less. Serious bodily injury to the child includes, but is not limited to, second or third degree burns, a fracture of any bone, a concussion, subdural or subarachnoid bleeding, retinal hemorrhage, cerebral edema, brain contusion, injuries to the skin that involve severe bruising or the likelihood of permanent or protracted disfigurement including those sustained by whipping children with objects].][11] ["Bodily injury" includes a cut, abrasion, bruise, burn or disfigurement, and physical pain or temporary illness or impairment of the function of a bodily member, organ, or mental faculty.][12]

["Torture" means the infliction of severe physical or mental pain upon the victim while he or she remains alive and conscious.][13]

"Knowingly" means that a person acts knowingly with respect to the conduct or to circumstances surrounding the conduct when the person is aware of the nature of the conduct or that the circumstances exist.[14]

The requirement of "knowingly" is also established if it is shown that the defendant acted "intentionally."[15]

"Intentionally" means that a person acts intentionally with respect to the nature of the conduct when it is the person's conscious objective or desire to engage in the conduct.[16]

[It is an exception to this offense that the child was being provided treatment by spiritual means through prayer alone in accordance with the tenets or practices of a recognized church or religious denomination by a duly accredited practitioner thereof in lieu of medical or surgical treatment. If the defendant proves this exception by a preponderance of the evidence,[17] you must find *[him] [her]* not guilty.][18]

Comments

1. Aggravated child abuse and neglect is a Class B felony. T.C.A. § 39-15-402(b). Aggravated child abuse and neglect of a child eight (8) years of age or less, or who was vulnerable because mentally defective, mentally incapacitated or suffering from physical disability is a Class A felony. For offenses committed on or after 7/1/11, the court may, in addition to any other punishment otherwise authorized by law, order a person convicted of aggravated child abuse to refrain from having any contact with the victim of the offense, including but not limited to, attempted contact through Internet services or social networking web sites; provided that the person has no parental rights to such victim at the time of the court's order. T.C.A. § 39-15-402(g).
2. The Committee is of the opinion that the language of T.C.A. § 39-15-402(c) are words "of similar import" as the term is used in T.C.A. § 39-11-202 (Exceptions).

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[1] T.C.A. § 39-15-402(a).
[2] T.C.A. § 39-15-401(g).
[3] T.C.A. § 39-15-401(a) and (b).
[4] T.C.A. § 39-17-402(4).
[5] T.C.A. § 39-15-402(e).
[6] T.C.A. § 39-11-106(a)(5).
[7] Taken from *State v. Williams*, 690 S.W.2d 517, 529 (Tenn. 1985).
[8] T.C.A. § 39-11-106(a)(2). This is the definition of "bodily injury".
[9] *State v. Mateyko*, 53 S.W.3d 666, 668-72 (Tenn. 2001).
[10] *State v. Adams*, 24 S.W.3d 289, 294-97 (Tenn. 2000).
[11] T.C.A. §§ 39-15-402(d) and 39-11-106(a)(34). The trial judge may wish to omit the language "or broken bone of a child who is eight (8) years of age or less" if not fairly raised in the proof.
[12] T.C.A. § 39-11-106(a)(2).
[13] Taken from *State v. Williams*, 690 S.W.2d 517, 529 (Tenn. 1985).
[14] T.C.A. § 39-11-106(a)(20). The "result of conduct" language in the definitions of "knowingly" and "intentionally" has been removed from this instruction, as the Tennessee Supreme Court has held that

"the mens rea of 'knowing' refers only to the conduct elements of treatment or neglect of a child under the child abuse statute and [we] conclude that the child abuse offenses are not result-of-conduct offenses." *State v. Ducker*, 27 S.W.3d 889, 897 (Tenn. 2000).

[15] T.C.A. § 39-11-301(a)(2).

[16] T.C.A. § 39-11-106(a)(18). The "result of conduct" language in the definitions of "knowingly" and "intentionally" has been removed from this instruction, as the Tennessee Supreme Court has held that "the mens rea of 'knowing' refers only to the conduct elements of treatment or neglect of a child under the child abuse statute and [we] conclude that the child abuse offenses are not result-of-conduct offenses." *State v. Ducker*, 27 S.W.3d 889, 897 (Tenn. 2000).

[17] T.C.A. § 39-11-202(b)(2). The trial judge should utilize T.P.I. – CRIM. 42.01 (Preponderance of evidence).

[18] T.C.A. § 39-15-402(c).

T.P.I. -- CRIM. 26.14

ILLEGAL *[REGISTRATION] [VOTING]*

Any person who commits illegal *[registration] [voting]* is guilty of a crime.

For you to find the defendant guilty of this offense, the state must have proven beyond a reasonable doubt the existence of the following essential elements:[1]

[Part A:

(1) that the defendant *[registered] [voted] [attempted to register] [attempted to vote]* in any manner where or when such person was not entitled to *[, including voting more than once in the same election]*;

and

(2) that the defendant acted intentionally, knowing that such person was not entitled to *[register] [vote]*.]

or

[Part B:

(1) that the defendant voted in the primary elections of more than one (1) political party on the same day.]

["Election" means a general election for which membership in a political party in order to participate therein is not required.][2]

["Political party" means an organization which nominates candidates for public office.][3]

["Primary election" means an election held for a political party for the purpose of

allowing members of that party to select a nominee or nominees to appear on the general election ballot.][4]

Comments

1. Illegal registration or voting is a Class D felony. T.C.A. § 2-19-107.

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[1] T.C.A. § 2-19-107.
[2] T.C.A. § 2-1-104(a)(7).
[3] T.C.A. § 2-1-104(a)(14).
[4] T.C.A. § 2-1-104(a)(20).

T.P.I. – CRIM. 31.06

UNLAWFUL *[DISTRIBUTION] [DISPENSING]* OF A CONTROLLED SUBSTANCE

Any person who commits the offense of unlawful *[distribution] [dispensing]* of a controlled substance is guilty of a crime.

For you to find the defendant guilty of this offense, the state must have proven beyond a reasonable doubt the existence of the following essential elements:[1]

(1) that the defendant *[distributed] [dispensed]* a controlled substance for any purposes other than one authorized by and consistent with *[his] [her]* professional or occupational licensure;

and

(2) that the substance was *[specify controlled substance]*, a controlled substance.

[_____] is a Schedule *[____]* controlled substance.[2]

"Deliver" means the actual, constructive, or attempted transfer from one person to another of a controlled substance, whether or not there is an agency relationship.[3]

"Dispense" means to deliver a controlled substance to an ultimate user or research subject by or pursuant to the lawful order of a practitioner, including the

prescribing, administering, packaging, labeling, or compounding necessary to prepare the substance for that delivery.[4]

"Dispenser" means a practitioner who dispenses.[5]

"Distribute" means to deliver other than by administering or dispensing a controlled substance.[6]

"Distributor" means a person who distributes.[7]

COMMENTS

1. Unlawful distribution or dispensing of a controlled substance is a Class D felony, with fines of up to $100,000 for a violation involving a Schedule I or II controlled substance, $50,000 for a violation involving a Schedule III or IV controlled substance, $5,000 for a violation involving a Schedule V or VI controlled substance, and $1,000 for a violation involving a Schedule VII controlled substance. T.C.A. § 53-11-401(b).

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[1] T.C.A. § 53-11-401(a)(1).
[2] "Controlled substance" means a drug, substance, or immediate precursor in Schedules I through VIII of T.C.A. § 39-17-403 to T.C.A. § 39-17-415. T.C.A. § 39-17-402(4).
[3] T.C.A. § 39-17-402(6).
[4] T.C.A. § 39-17-402(7).
[5] T.C.A. § 39-17-402(8).
[6] T.C.A. § 39-17-402(9).
[7] T.C.A. § 39-17-402(10).

T.P.I. -- CRIM. 38.01(b)

DRIVING UNDER THE INFLUENCE [ACCOMPANIED BY A CHILD] [RESULTING IN SERIOUS BODILY INJURY TO A CHILD] [RESULTING IN THE KILLING OF A CHILD]
(for offenses committed on or after 1/1/11)

Any person who commits the offense of driving under the influence of *[an intoxicant] [marijuana] [a controlled substance*[1]*] [a drug] [a substance affecting the central nervous system] [or any combination thereof] [accompanied by a child] [resulting in serious bodily injury to a child] [resulting in the killing of a child]* is guilty of a crime.

For you to find the defendant guilty of this offense, the state must have proven beyond a reasonable doubt the existence of the following essential elements:[2]

(1) that the defendant was driving or was in physical control of an automobile or motor driven vehicle;

and

(2) that this act occurred on *[a public road or highway or public street or alley] [the premises of any shopping center] [the premises of any trailer park] [the premises of any apartment house complex] [any premises which are generally frequented by the public at large]*;

and

(3)(a) that the defendant was under the influence of *[an intoxicant] [marijuana] [a controlled substance] [a drug] [a substance affecting the central nervous system] [or any combination thereof]*;

or

(b) that the alcohol concentration in the defendant's blood or breath was eight-hundredths of one percent (.08%) or more.

[and

(4)(a) that the defendant was accompanied by a child under eighteen (18) years of age;

or

(b) that the defendant was accompanied by a child under eighteen (18) years of age, and such child suffered serious bodily injury[3] as the proximate result of the defendant's driving under the influence;

or

(c) that the defendant was accompanied by a child under eighteen (18) years of age, and such child was killed as the proximate result of the defendant's driving under the influence.]

"Intoxication" is defined as acting under the influence of *[an intoxicant] [marijuana] [a controlled substance] [a drug] [a substance affecting the central nervous system] [or any combination thereof].*

The expression "under the influence of *[an intoxicant] [marijuana] [a controlled substance] [a drug] [a substance affecting the central nervous system] [or any combination thereof]*" covers not only all the well known and easily recognized conditions and degrees of intoxication, but also any mental or physical condition which is the result of taking *[an intoxicant] [marijuana] [a controlled substance] [a drug] [a substance affecting the central nervous system] [or any combination thereof]* in any form and which deprives one of that

clearness of mind and control of oneself which one would otherwise possess. In this situation, it would not be necessary that the person be in such a condition as would make *[him] [her]* guilty of public drunkenness. The law merely requires that the person be under the influence of *[an intoxicant] [marijuana] [a controlled substance] [a drug] [a substance affecting the central nervous system] [or any combination thereof].* The degree of intoxication must be such that it impairs the driver's ability to safely operate a motor vehicle by depriving the driver of the clearness of mind and control of *[himself] [herself]* which *[he] [she]* would otherwise possess.[4]

["Proximate result" means a result, which in natural and continuous sequence, is a product of an act occurring or concurring with another, which, had it not happened, the result would not have occurred.][5]

COMMENTS

1. Driving under the influence (first offense) is punishable by a fine of not less than three hundred fifty dollars ($350) nor more than one thousand five hundred dollars ($1,500) and confinement in the county jail or workhouse for not less than forty-eight (48) hours nor more than eleven (11) months and twenty-nine (29) days, and the defendant must perform 24 hours of litter pickup. T.C.A. § 55-10-403(a)(1) and (s). If defendant has a prior conviction within the past five (5) years, the court "shall order the person to undergo a drug and alcohol assessment and receive treatment as appropriate." T.C.A. § 55-10-403. If the defendant is accompanied by a child, there is a mandatory minimum incarceration of 30 days and a mandatory minimum fine of $1,000. If the child suffers serious bodily injury as a proximate result, the DUI "shall be punished as provided in T.C.A. § 39-13-106, for vehicular assault." If the child is killed as a proximate result, the defendant "commits a Class B felony and shall be punished as provided in § 39-13-213(b)(2) for vehicular homicide involving intoxication." The judge must report any such child endangerment to appropriate authorities for investigation pursuant to T.C.A. § 37-1-403(d)(2).

2. *See* T.P.I. – Crim. 38.02 (Lawful Use Not a Defense); T.P.I. – Crim. 38.03 (Additional Blood Sample); T.P.I. – Crim. 38.04 (Refusal of Test); T.P.I. – Crim. 38.05 (Blood Alcohol Test); T.P.I. – Crim. 38.06 (Physical Control); and T.P.I. – Crim. 38.08 (Supplemental Instruction for Multiple Counts of Prior Convictions); and T.P.I. – Crim. 38.09 (Driving While Impaired).

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[1] As DUI is a Title 55 offense, the definition of "controlled substance" contained in Tenn. Code Ann. § 39-17-402(4) does not strictly apply. Tenn. Code Ann. § 39-17-402 begins with the language "As used in this part and title 53," and so the definitions contained in that statute only apply to Title 39 and 53 offenses. Upon agreement of the parties, it is recommended that a definition of controlled substance be included in the written charge. The court may desire to refer to Title 39 for the definition.

[2] T.C.A. § 55-10-401 and T.C.A. § 55-10-403(a).

[3] As driving under the influence is a Title 55 offense, the definition of serious bodily injury contained in Tenn. Code Ann. § 39-11-106(a)(34) does not strictly apply. Tenn. Code Ann. § 39-11-106(a) begins with the language "As used in this title," and so the definitions contained in that statute only apply to Title 39 offenses. Upon agreement of the parties, it is recommended that a definition of serious bodily injury be included in the written charge. The court may desire to refer to Title 39 for the definition.

[4] T.C.A. § 55-10-401(a)(1).

[5] The definition of "proximate result" is based on the definition of "proximate cause," as set forth in T.P.I. – Crim. 7.05(b), Second degree murder (drugs as proximate cause).